TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[redacted]

No. [redacted] 56

TOWN OF [redacted], APPELLANT,

vs.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 10, 1914.

(24,031)

(24,021)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 340.

TOWN OF ESSEX, APPELLANT,

vs.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, Begun and Holden at Boston, within and for the District of Massachusetts, on the Second Tuesday of September, Being the Ninth Day of September, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Before the Honorable James M. Morton, Jr., District Judge

No. 32, Equity Docket.

(No. 198, C. C.)

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, Complainant,
v.
TOWN OF ESSEX, Defendant.

The Bill of Complaint in this cause was filed in the clerk's office on the thirty-first day of July, A. D. 1905, and was duly entered at the February Term of the Circuit Court, A. D. 1905, and is in the words and figures following:

Bill of Complaint.

(Filed July 31, 1905.)

To the Honorable the Justices of the Circuit Court of the United States for the District of Massachusetts:

The New England Telegraph Company of Massachusetts, a citizen of the Commonwealth of Massachusetts, brings this its bill of complaint against the Town of Essex, a citizen of the Commonwealth of Massachusetts, and thereupon your orator complains and says:

2 I. That your orator is a corporation duly organized and existing under and in accordance with the laws of the Commonwealth of Massachusetts and is a citizen of said State and a resident therein, and is an integral part of the system of the Postal Telegraph-Cable Company.

II. That the Town of Essex is a citizen of the Commonwealth of Massachusetts and a resident therein.

III. That your orator is a telegraph company authorized by its charter to maintain and operate lines of telegraph in and between various states of the United States, including the State of Massa-

chusetts, and is actually engaged at the present time in maintaining and operating lines of telegraph running in and through various states of the Union and is engaged in interstate commerce by reason of the transmission of messages by it over its lines between the different states and throughout the United States, including the State of Massachusetts, constituting a comprehensive system by which telegraph messages are sent not only thereon throughout the United States, but to and from all parts of the civilized world. And your orator maintains many offices throughout the United States for receiving and transmitting messages for each and every of which intercommunication is had with each and every other office of the United States including each and every other office maintained by your orator in the State of Massachusetts, of which there are many in the various parts of the said State; and that your orator transmits messages from and to the Government of the United States at the City of Washington and in all the principal cities and municipalities and towns where your orator maintains its offices; and that said lines of telegraph within the State of Massachusetts are an indivisible portion of the said entire system of telegraph lines so maintained and operated as aforesaid; and that the matter in dispute in this suit largely exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000); and that, as hereafter more fully set forth, it arises under the constitution and laws of the United States; and that your orator being authorized so to do, prior to the construction of the line of tele-
3 graph hereinafter referred to, duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the Act of Congress of the United States entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Others Purposes," approved July 24, 1866, and the amendments thereto; and that your orator has fully complied with the provisions of said Act of Congress in that your orator has transmitted to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General of the Government of the United States, and that your orator has fully complied in all other respects with said acts of Congress and the obligations thereof. That said Act of Congress of 1866 authorizes your orator by reason of said acceptance to construct, maintain and operate its lines of telegraph over and along any of the post roads of the United States, and that by the Act of Congress of March 1st, 1884, all public roads and highways kept up and maintained as such are declared to be post roads: and your orator further alleges that the highways passing in and through said Town of Essex and upon which your orator desires to construct its lines of telegraph have been and now are public highways kept up and maintained as such, and are post roads within the meaning of the acts of Congress as aforesaid.

IV. That in the year 1884 your orator constructed a line of telegraph from the City of New York in the State of New York to the Transatlantic cable station in the Town of Rockport in the Commonwealth of Massachusetts; that the Town of Rockport can and

could only be reached by constructing a line either through the Town of Essex or the Town of Manchester; that the direct route is through the Town of Essex, and to construct a line through the Town of Manchester would involve an extremely circuitous route and would entail great and heavy expenditures of money and would be an extreme hardship upon your orator; that, accordingly, your orator in the year aforesaid constructed its line of telegraph through the town of Hamilton which borders Essex on the west to a point on the easterly boundary of said Hamilton which was fixed by the action of said Town; that the point in the westerly boundary of the City of Gloucester which borders Essex on the east, where
4 your orator's line touches said boundary, was fixed by the action of said city; that between the points so as aforesaid fixed by the Town of Hamilton and the city of Gloucester there are absolutely no other roads or highways whatsoever that can be used as a route for your orator's line than those no- occupied by it, to-wit: from the town line of Hamilton through Western Avenue, Main Street and Eastern Avenue to the Gloucester line; that your orator constructed its line as aforesaid through the town of Essex with the consent and permission of its selectmen and it has remained substantially as so constructed down to the time of the filing of this bill; that said highways are of sufficient width to allow of the construction and operation of your orator's line of telegraph without inconvenience to the public as is evidenced by the fact that the said line has been in existence there for more than twenty years.

V. That at the present time and for a considerable period prior hereto certain of the poles in your orator's line of telegraph in said Town of Essex are and have been old and rotten, and certain of the wires inoperative, and the telegraph line of your orator in said town is in places in an unsafe condition and dangerous to the public and liable at any time to become wholly inefficient for the purposes of your orator's business; that since your orator's line was constructed in said town many trees have been planted and new driveways have been made and buildings erected, and the poles have been carried up to an unusual height to clear the trees in said highways, and for these and other reasons the line of your orator's telegraph in said Town of Essex needs re-locating on said highways in which it now exists, for the benefit of the abutters and the town, and to meet the present conditions of your orator's business. That, therefore, on June 1st, 1905, your orator for the purpose of relocating its line of telegraph in the Town of Essex on the highways aforesaid filed a petition in writing with the board of selectmen of the Town of Essex, a copy of which petition is hereto annexed, marked "A," and it is prayed that the same may be taken as a part hereof; that in said petition your orator prayed for a location for its poles and wires and license to maintain the same in the following named streets and highways of said town, viz., from the town line of Hamilton
5 through Western Avenue, Main Street and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles and any changes in the present location to be made under the direction of the board of

selectment; that on July 10, 1905, the board of selectmen of the Town of Essex at a meeting thereof voted not to grant the New England Telegraph Company of Massachusetts any locations for its poles and wires in the town and notified your orator to that effect by a letter, a copy of which is hereto annexed marked "B," and it is prayed that the same may be taken as a part hereof; that on the same day that your orator received this notification the selectmen of the said town orally declared to your orator that it was the intention of the town to prevent your orator from maintaining or operating any line of telegraph whatsoever within the limits of said town and threatened if your orator attempted to re-locate any of its poles in said highways to prevent your orator from so doing; that, thereupon, your orator was obliged by reason thereof and by force to stop said re-location and did so stop said re-location and by reason thereof your orator has been and still is unable to re-locate its said line of telegraph, or any portion thereof, on said highways in and through said town; that, thereupon, your orator attempted, without any re-location, in order to put its said line in said town into a safe and efficient condition, to re-set certain of its poles, substituting sound poles for rotten poles, in the same places occupied by the old poles, and to re-string its wires on said line, and to do other repairs necessary to put the said line into a safe and efficient condition, but, nevertheless, the selectmen of the town of Essex peremptorily forbade your orator from re-setting its poles, from substituting sound for rotten poles, or from restringing its wires, or making any repairs whatsoever of any name, nature or description, and threatened to take steps to prevent your orator from so doing if it continued in said attempt; that, thereupon, your orator was obliged by reason thereof and by force to stop all repairs and re-setting and re-stringing and did so stop all repairs and re-setting and re-stringing, and by reason thereof your orator has been and still is unable to repair its line or re-set its poles or re-string its wires in said town; that your
6 orator's line of telegraph in the said town of Essex is in a precarious condition, that there is extreme peril to life and limb and imminent danger of there being a break and interruption in its line of telegraph running so as aforesaid from the city of New York to said cable station in the town of Rockport; that your orator's line within the limits of the Town of Essex forms an important link in the interstate and international telegraph system maintained and operated by your orator; that from the aforesaid cable station in Rockport is the shortest route to various European places of great importance, particularly Russia; that the integrity of your orator's line is of great importance in view of the approaching Russian-Japanese Conference; that a new cable is now being laid — western terminus of which is to be the aforesaid cable station at Rockport; that in view of all this an interruption or break in said system in the Town of Essex would cause great damage to your orator and might be attended with serious results to many people in the United States and embarrass the Government of the United States itself.

VI. That the statutes of the Commonwealth of Massachusetts do

not permit a town in said State to refuse to allow a telegraph company to make changes, repairs and re-setting in its line necessary to keep said line in a state of efficiency and safety, nor to refuse absolutely to allow a telegraph company to re-locate its line; or to refuse such company any location whatsoever.

VII. And your orator alleges that all of said acts of the defendant so done and threatened as aforesaid, and which defendant will do unless restrained by order of this Honorable Court as your orator verily believes, are contrary to equity and good conscience and tend to manifest wrong and oppression of your orator in the premises.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and shall have only relief in a court of equity where matters of this kind are cognizable and relievable.

Wherefore your orator prays that the said defendant, its officers, agents and employees, each and all, be enjoined and restrained from interfering in any manner whatsoever with the re-location by your orator on the roads and highways now occupied by its said
7 line of telegraph in said town or with the re-setting of the poles of said line in said town by your orator, or with your orator's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency or from in any manner causing or allowing any other person or corporation to interfere with or stop such re-location, re-setting, repairs or changes by your orator; and that your orator may have such other or further relief, or both, in the premises as the nature of the case shall require and to your Honors seem meet and agreeable to equity and good conscience.

May it please your Honors to grant to your orator both the writ or writs of injunction and temporary injunction issuing out of and under the seal of this Honorable Court to be directed to the defendant, and its officers, employees and agents, and all other persons, to restrain them as in your orator's prayer for relief above set forth; and also that the writ of subpœna of the United States of America be directed to the said defendant, the Town of Essex, demanding the said defendant, at a certain day and under certain pain therein to be specified personally to be and appear before your Honors in this Honorable Court and then and there to answer all and singular the premises and to stand to, perform and abide such order and decree therein as to your Honors shall seem meet and agreeable to equity and good conscience, but answer under oath is hereby expressly waived by your orator; and your orator will ever pray.

By Its Attorneys, CARVER & BLODGETT.

G. PHILIP WARDER,
Solicitor and of Counsel.

8 "A."

The New England Telegraph Company, of New York, respectfully petitions the Honorable Board of Selectmen, of the Town of

Essex, Mass., for a location for its poles and wires, and license to maintain the same, in the following-named streets and highways of said town, viz:

From the town line of Hamilton, through Western Avenue, Maine Street, and Eastern Avenue to the Gloucester line, the new poles to occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Board.

NEW ENGLAND TELEGRAPH COMPANY OF NEW YORK,
By EDWARD B. PILLSBURY,
Superintendent.

Dated, Essex, Mass., June 1, 1905.

The above petition is granted.

____ ____,
____ ____,
____ ____,
Selectmen of Essex, Mass.

Dated, Essex, Mass., June —, 1905.

"B."

Office of Selectmen.

ESSEX, MASS., Jul- 11, 1905.

New England Telegraph Co., #84 State St., Boston, Mass.:

At a meeting of the board of selectmen of Essex held July 10th, 1905, it was voted not to grant the New England Telegraph Co. a location for its poles and wires in this town.

AARON COGSWELL, *Chairman.*

At the same term, to wit, July 31, 1905, a Motion for Temporary Injunction was filed by complainant.

9 Also at the same term, the following Motion to Amend Bill of Complaint and was filed and assented to:

Motion to Amend Bill of Complaint.

(Filed August 3, 1905.)

And now comes the complainant in said cause and moves to amend his bill by inserting in the prayer for relief in the fourth line thereof (35th line of page 6 of this Transcript of Record) after the word "whatsoever" and before the word "with," the words—"with your orator's line of telegraph in said Town of Essex or"; and by in-

serting after said word "with" and before the word "the," the words—"the location or".

By Its Attorneys, CARVER & BLODGETT.

Allowance assented to:

WM. B. SULLIVAN,
F. C. RICHARDSON,
Att'ys for Def't.

Also at the same term, to wit, September 5, 1905, the Motion for Temporary Injunction was allowed by the Court, and the following Order was entered:

Order.

September 5, 1905.

LOWELL, *J.:*

This cause came on to be heard on the complainant's motion for a temporary injunction and upon the bill of complaint and the affidavits of the complainant and the defendants not appearing and not having filed any affidavits, it is hereby ordered, adjudged and decreed that the defendant, its officers, agents and employees, each and all be and they hereby are, enjoined and restrained, until the further order of this court, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant.

By the Court.

L. C. TUCKER,
Deputy Clerk.

At the same term, the following Answer was filed:

Answer of the Defendant.

(Filed Sept. 26, 1905.)

1. The defendant pleads ignorance of the corporate capacity and character of the plaintiff, and therefore denies that it is a duly established and existing corporation, having authority to do business. The defendant denies that the plaintiff is a citizen of the Commonwealth of Massachusetts.

2. The defendant admits that the Town of Essex is a municipal corporation of the Commonwealth of Massachusetts.

3. The defendant denies that the plaintiff has any authority to maintain and operate lines of telegraph between various states of the United States as alleged; and the defendant denies that the plaintiff is actually engaged at the present time in maintaining and operating lines of telegraph in more than one state of the United States, or in any state of the United States, and the defendant denies that the plaintiff is engaged in the transmission of telegraph messages over its lines between the different states and throughout the United States, including the State of Massachusetts. The defendant denies that the plaintiff has a comprehensive system by which telegraph messages are sent not only throughout the United States, but to and from all parts of the civilized world, or that the plaintiff maintains many offices throughout the United States. The defendant denies that the plaintiff transmits messages from and to the Government of the United States at the City of Washington, or at any other place. The defendant further denies the jurisdiction of this court. It denies that the matter in dispute largely exceeds, inclusive of interest and costs, the sum of two thousand dollars, or that the matter arises under the Constitution and laws of the United States. The defendant has no knowledge that the plaintiff duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of an Act of Congress entitled "An Act to aid in the construction of telegraph lines, and to secure the Government the use of the same for postal, military and other purposes, approved July 24, 1866, and amendments thereto," and therefore it denies this allegation, and calls upon the plaintiff to prove the same. The defendant denies that the plaintiff has transmitted
12 to and from the Government of the United States telegraph messages at rates fixed by the Postmaster General. The defendant denies that the Act of Congress of 1866 authorized the plaintiff to construct, maintain and operate its lines of telegraph over the roads and streets of the defendant without first having obtained a franchise from its Board of Selectmen in accordance with the Statutes of the Commonwealth of Massachusetts; and the defendant further denies that the Act of March 1, 1884, made all public roads subject to the use of the plaintiff for its business purposes without any grant from the legally constituted officers of the defendant, or the legislature of the Commonwealth of Massachusetts. The defendant denies that the Act of March 1, 1884, gave the plaintiff any rights or privileges. The defendant avers that said Act only declared what highways should be used as post routes. The defendant denies that Congress has the authority under the Constitution of the United States to grant to the plaintiff any rights in the public highways of the defendant. It further denies the authority of Congress under the Constitution of the United States to grant to the plaintiff any authority to use the public highways of the defendant without first having obtained the permission of the duly authorized officers of the defendant, or the authority to take such streets or such rights in said streets by the right of eminent domain granted by the Massa-

chusetts legislature. That Congress has no right to grant to the plaintiff rights to use its public town streets without some provision for compensation. This defendant denies that the streets on which the plaintiff claims that it has maintained its lines are post roads within the meaning of the Acts of Congress as aforesaid, but avers that they are simply post routes, the Government by said Act permitting its servants in its post-office department to carry the mail over said streets. This defendant denies that the United States has any interest whatever in these streets or highways. It denies that the United States ever expended any sum of money or performed any services or contributed any valuable thing toward the construction or maintenance of these highways, or that the United States has any control whatever over these highways which will enable Congress to grant to the plaintiff any rights therein to do its private business.

4. The defendant has no knowledge that the plaintiff constructed a line of telegraph from the City of New York to the Trans-
13 atlantic Cable Station in the Town of Rockport, and therefore denies the same. The defendant further denies that the Town of Rockport can and could only be reached by constructing a line either through the defendant or the town of Manchester. This defendant has no knowledge whether the direct route is through the Town of Essex, and whether to construct a line through the Town of Manchester would involve an extremely circuitous route, or whether it would entail great and heavy expenditures of money, and would be an extreme hardship upon the plaintiff; and further the defendant has no knowledge of what action the Town of Hamilton took in fixing a point on the easterly boundary of said Hamilton, nor has it any knowledge as to what action the town of Hamilton took in relation to fixing a point in the westerly boundary in the City of Gloucester as is alleged in the fourth paragraph of the bill, but it denies the authority of the Town of Hamilton to grant any rights to the plaintiff in the City of Gloucester, and it denies the authority of the Town of Hamilton to grant any rights to the plaintiff in the Town of Essex; and it further denies the authority of the City of Gloucester to grant any rights to the plaintiff in the Town of Essex. The defendant denies the allegation that there are absolutely no other roads or highways whatsoever that can be used as a route for the plaintiff's lines than those now occupied by it. The defendant further denies that the plaintiff constructed its line through the Town of Essex with the consent and permission of its Selectmen. The defendant avers that a certain line of telegraph was constructed in its streets without authority or permission of the defendant, or any of its duly authorized officers, and that neither at the time of its construction or ever since has any authority or consent been given by any duly authorized persons, officers or agents in behalf of the defendant. And the defendant further denies that this line has remained substantially as so constructed down to the time of the filing of the bill. And the defendant further denies that the highways are of sufficient width to allow the construction and operation of the plaintiff's line of telegraph without inconvenience to the pub-

lic. The defendant further denies that the plaintiff has obtained any right by prescription or that the line has been in existence for more than twenty years, and avers that the Statutes of Massachusetts provides that the plaintiff obtained no legal right to the continued enjoyment of an easement, or that there is any presumption of a
14 grant thereof, because of the existence of the lines as alleged.

5. The defendant is without knowledge as to the condition of the plaintiff's poles and wires, and therefore denies the allegations in paragraph five as to their condition.

The defendant, denying that the plaintiff ever built a line in said town, admits that within the last twenty years there has been many trees planted, new driveways have been made and buildings erected, and avers if poles have been carried up to an unusual height to clear the trees in the defendant's highways, it has been done without authority, and based upon no right whatsoever. The defendant further denies that the plaintiff's lines in said town needs relocating on the highways in which it now exists. The defendant denies that on June 1, 1905, the plaintiff filed a petition in writing with the Board of Selectmen of the defendant, praying for a location for its poles and wires, and a license to maintain the same in the streets and highways named in paragraph five. The defendant further denies that on the tenth day of July the Selectmen of the town of Essex, at a meeting thereof, voted not to grant to the plaintiff any location for its poles and wires in the town, or that said Selectmen notified the plaintiff to that effect. It is admitted that the town, through its Selectmen, have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town. The defendant denies that any threat was made that the plaintiff would be prevented from attempting to relocate any of its poles in said highways, or that any force was used to stop said relocation. It is admitted that the Selectmen of said Town of Essex forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts. The defendant denies that there is extreme peril to life and limb, and as to the allegation of there being imminent danger of there being a break and interruption in the plaintiff's line of telegraph running from the City of New York to the Cable Station in the Town of Rockport, the defendant has no knowledge and therefore denies the same. And the
15 defendant also denies that the plaintiff's lines within the Town of Essex forms an important link in the Interstate and International telegraph system, maintained and operated by the plaintiff. The defendant has no knowledge as to the shortest routes to the various European places of great importance, or the value to the plaintiff of the integrity of the plaintiff's lines in view of the approaching Russian-Japanese Conference as alleged, or that a new cable is now being laid and it neither admits or denies said allegations, but calls upon the plaintiff to prove them. The defendant further denies that any interruption or break in the plaintiff's system in the Town

of Essex would cause to many people in the United States, and the government of the United States itself, any embarrassment.

6. The defendant denies the allegations of law contained in the sixth paragraph of the bill, and avers that this company has not now, and never had any rights whatsoever in the highways of the Town of Essex, either by grant from Congress, from the General Court of Massachusetts or from the Selectmen of the Town of Essex, or any other legally constituted authority. The defendant further answering says that the plaintiff, without permission and without right, erected poles and strung its wires in the year 1884 through the following named streets in the Town of Essex, Western Avenue, Main Street and Eastern Avenue; that no written specifications were ever given to the plaintiff by the Selectmen of the defendant under Chapter 109 of the Public Statutes of Massachusetts so to do, or Acts in amendment thereof, or under Chapter 25 of the Revised Laws of Massachusetts. That some time in the month of June, 1905, some company (the New England Telegraph Company of New York) not the plaintiff, filed a petition with the Board of Selectmen for a location of poles and wires and a license to maintain the same, which petition was refused. The defendant further avers that it never gave any location to the plaintiff to go through or into the highways of the defendant, and it has never consented that the plaintiff should maintain its poles and wires in its highways, and if the plaintiff now has any poles or wires therein, they are there without right. And the defendant further avers that the plaintiff is now out of business, that its entire assets have been transferred to the Farmers' Loan & Trust Company of New York, or to some other corporation, and that the plaintiff now has no interest whatever in any telegraph lines,
16 interstate or otherwise.

And the defendant further answers that the bill is defective and should be dismissed on the following grounds:—

A. The interest in the highways of the defendant upon which the plaintiff's case is predicated is by law required to be in writing and the bill does not contain an allegation to that effect.

B. That the bill shows that the plaintiff has sufficient remedy at law, and therefore there is no jurisdiction in equity.

C. That the plaintiff shows no title whatever for relief.

D. That the bill does not contain sufficient allegations to give this court jurisdiction, as this is a controversy between alleged citizens of the same state, which does not arise under the laws of the United States, but is a controversy that is governed entirely by the laws of Massachusetts and its courts.

This defendant prays that it may have the same benefit and advantages under this answer as if the matters and things herein set forth had been pleaded by way of a plea or demurrer, and the defendant further prays for its costs.

TOWN OF ESSEX,
By AARON COGSWELL,
FRANK E. McKENZIE,
ENOCH B. KIMBALL,
Selectmen of Essex, Mass.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

Aaron Cogswell, being duly sworn, deposes and says that he is Chairman of the Board of Selectmen of the defendant; that he has read the foregoing answer and knows the contents thereof; that all the matters therein stated as to the acts of said defendant he knows to be true; that all other matters therein stated he believes to be true.

AARON COGSWELL.

Subscribed and sworn to this 25th day of September, 1905, before me,

[SEAL.] EBEN F. STANWOOD,
Notary Public.

Affidavit of Counsel.

I, Frank C. Richardson, being of counsel for the defendant, hereby certify that in my opinion the matters herein stated as grounds for demurrer are well founded in point of law, and that they are
17 not interposed for delay.

FRANK C. RICHARDSON.

On the same day, the following Cross-Bill was filed by defendant:

Cross-bill of Defendant, Town of Essex.

(Filed September 26, 1905.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Massachusetts:

The inhabitants of the Town of Essex, a municipal corporation in the Commonwealth of Massachusetts, and a citizen of the State of Massachusetts, by its Board of Selectmen brings this its cross-bill against the New England Telegraph Company of Massachusetts, and a citizen of the State of Massachusetts, and thereupon your orator complains and says:—

1. That the defendant herein, the Town of Essex, is a municipal corporation duly organized, and existing in the Commonwealth of Massachusetts.

2. That the defendant has all the powers, rights and privileges, burdens and liabilities over its roads and highways that are common to municipalities that have been incorporated in the Commonwealth of Massachusetts, and that are mentioned in its charter dated February 15, 1819 from the Great and General Court of said Commonwealth.

3. That from time to time the defendant has established public highways within its borders and at its sole expense has built and maintained the same from time immemorial. That among those

public highways so constructed and maintained are the following named streets,—Western Avenue, Main Street and Eastern Avenue.

4. That the Government of the United States, or any body corporate or person whatsoever, have no interest in these highways except the inhabitants of said town who are abutters thereon, and who own the fee in said streets subject to the right of the public to pass and repass thereon.

5. That the plaintiff, the New England Telegraph Company of Massachusetts, is a corporation organized for private purposes, and for the purpose of making a profit for its several stockholders. That it has no interest in the Government of the United States beyond the interest of any of its citizens, and that the Government of the United States has no interest in the plaintiff and no connection with
18 the plaintiff beyond its interest and connection with its other citizens. That the State of Massachusetts has given to the plaintiff no legislative grants whatever, and it has no power or rights of eminent domain.

6. That the plaintiff, the New England Telegraph Company of Massachusetts, was organized under the general laws of Massachusetts, Public Statutes Chapter 106, April 7, 1884, with a capital stock of $30,000, divided into 300 shares of the par value of $100. That by its last return to the Commissioner of Corporations in said Commonwealth dated August 17, 1905, it certified that at its last annual meeting held on August 8, 1905, its entire stock was owned and held by the Farmers' Loan & Trust Company as trustee. That its entire assets consisted of poles and wires valued at $15,000.

7. That the Statutes of the Commonwealth of Massachusetts provide that the selectmen of the town through which the line- of a telegraph company are to pass, shall give the company a writing specifying where the posts may be located, the kind of posts, the height at which and where the wires may be run, and may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic communication. That before a company organized for the purposes specified in the bill as the plaintiff alleges it was organized for, obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the plaintiff to obtain the consent of the selectmen of said town in accordance with the Statutes of said Commonwealth.

8. That some time in the year 1884, without obtaining the consent of the selectmen of the defendant, and without obtaining any right whatsoever in the defendant's streets mentioned as aforesaid, the plaintiff by its servants and agents erected wires and poles in the streets of the defendant hereinbefore mentioned, and has since maintained the same for *their* private business purposes and profit against the objection of the defendant and its Board of Selectmen.

9. That for several years the defendant did not know who was responsible for the maintenance of these poles. It did not know who was responsible for the erection of the poles and wires mentioned, and was not certain until the bringing of this bill, who
19 claimed to own these poles and wires mentioned as aforesaid, but since the bringing of this bill the selectmen of the de-

fendant have requested the plaintiff to forthwith remove its poles and wires from its streets as aforesaid, but the defendant has refused and neglected so to do.

10. That it is provided by the laws of Massachusetts that the enjoyment by any corporation for any length of time of the privilege of having or maintaining telegraph poles, wires or apparatus in, upon and over any streets or public highways, shall give no legal right to the continued enjoyment of such easement or raising any presumption of a grant thereof.

11. That the defendant, through its Board of Selectmen, have done everything in their power to induce the plaintiff to remove its said poles and wires from the highways of the defendant, but the plaintiff has refused, and continues to refuse so to do, and therefore continues to trespass upon the highways of the defendant, without right and without authority, and threatens to continue so to do.

12. That since this bill has been filed and the preliminary injunction issued herein restraining the defendant, its officers, agents and employees from interfering in any manner whatsoever with the relocation by the plaintiff on the roads and highways now occupied by its line of telegraph in said town, the plaintiff has not only made repairs upon its poles and line of telegraph, but it has reset said poles in different locations. It had changed the line of telegraph from its original location upon said streets, and has done many other things under the protection of the restraining order of this court which it has no authority so to do.

Wherefore your orator prays,

1st. That the plaintiff, its officers, agents and employees, each and all, be ordered to forthwith take up its poles from said streets and to leave said streets reasonably safe and convenient for travel as they were before the plaintiff entered thereon.

2nd. And your orator further prays that the plaintiff, its servants, officers and agents, be restrained from using said poles and wires for its business purposes until it shall have first obtained a franchise from the Board of Selectmen of the defendant, as is provided by the laws of the Commonwealth of Massachusetts.

3rd. And that your orator may have such other or further relief or both in the premises as the nature of the case shall require, and — your Honors shall seem meet and agreeable to equity and good conscience.

Answer under oath is hereby expressly waived by your orator to this cross-bill.

AARON COGSWELL,
FRANK E. McKENZIE.
ENOCH B. KIMBALL,
Selectmen of Essex.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

On this 25th day of September, A. D. 1905, before me, Eben F. Stanwood, a Notary Public, duly commissioned and qualified for the Commonwealth of Massachusetts personally appeared Aaron

Cogswell, Frank E. McKenzie and Enoch B. Kimball, who, being duly sworn, declared, that the annexed statement, by them subscribed is true to the best of their knowledge and belief.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, the day and year above written.

[SEAL.] EBEN F. STANWOOD,
Notary Public.

This cause was thence continued from term to term to the February Term, A. D. 1906, when, to wit, March 16, 1906, the following Answer of New England Telegraph Company of Massachusetts to the Defendant's Cross-Bill was filed:

Answer of New England Telegraph Company of Massachusetts to the Defendant's Cross-bill.

(Filed March 16, 1906.)

First. The complainant admits the allegations in the first paragraph of the cross bill contained.

Second. The complainant admits that the defendant has all the powers, rights, privileges, burdens and liabilities set forth in the second paragraph of the cross-bill, subject, however, to the rights conferred by the Congress of the United States upon the complainant.

Third. The complainant admits the allegations in the third paragraph of the cross-bill contained.

21 Fourth. The complainant denies that the Government of the United States or any body corporate or person whatsoever has no interest in the highways referred to in paragraph 4 of the cross-bill except the inhabitants of the Town of Essex who are abutters thereon and who own the fee in said streets subject to the right of the public to pass and repass thereon.

Fifth. The complainant admits that the New England Telegraph Company of Massachusetts is a corporation organized for private purposes and for the purpose of making a profit for its several stockholders, but the complainant denies that it has no interest in the Government of the United States beyond the interest of any of its citizens and denies that the Government of the United States has no interest in the complainant and no connection with the complainant beyond its interest and connection with its other citizens, and denies that the State of Massachusetts has given to the complainant no legislative grants whatever and denies that the complainant has no power or rights of eminent domain. On the contrary the complainant says that by filing its written acceptance with the Postmaster General under Section 5268 of the United States Revised Statutes of the restrictions and obligations required by laws of Congress, the complainant became entitled to construct, maintain and operate its lines of telegraph through and over and along any of the military or post roads of the United States. That by an Act of Congress of March 1, 1884, entitled "An Act Making all Public Roads and Highways Post

Roads" (23 Stats. 3) all public roads and highways while kept up and maintained as such, were declared to be post roads; that under the provisions of this Act the roads and highways upon which the complainant has constructed its line of telegraph in the Town of Essex are post roads. That under Section 5265 of the United States Revised Statutes, telegrams between the several departments of the United States Government and their officers and agents, in their transmission over the lines of the complainant, have priority over all other business at such rates as the Postmaster General shall annually fix; that under Section 5267 of said Statutes, the United States are entitled to purchase the telegraph lines, property and effects of the complainant at an appraised value to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested and one by the four so previously selected; and that the complainant by an Act of the Legislature of the State of Massachusetts was chartered with the right to construct and operate its line of telegraph upon and along the highways and public roads of said State.

Sixth. The complainant admits the allegations in the sixth paragraph of the cross-bill contained.

Seventh. Answering the allegations of the first sentence of the seventh paragraph of the cross-bill, the complainant says that the provisions of the Statutes of the Commonwealth of Massachusetts in respect to the matters in question are contained in Chapter 237 of the Acts of the year 1903, and the complainant prays leave to refer to said Act for such provisions.

The complainant denies that before a company organized for the purposes for which the complainant company was organized obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the complainants to obtain the consent of the Selectmen of the Town of Essex, in accordance with the Statutes of the Commonwealth.

Eighth. The complainant denies that sometime in the year 1884, without obtaining the consent of the Selectmen of the defendant, and without obtaining any rights whatsoever in the defendant's streets mentioned as aforesaid, the complainant by its servants and agents erected wires and poles in the streets of the defndant hereinbefore mentioned and has since maintained the same for its private business interests and profit against the objection of the defendant and its Board of Selectmen.

Ninth. The complainant denies that for several years the defendant did not know who was responsible for the maintenance of these poles.

The complainant denies that the defendant did not know who was responsible for the erection of the poles and wires mentioned and was not certain until the bringing of this suit who claimed to own these poles and wires mentioned as aforesaid.

The complainant admits that since the bringing of this bill the selectmen have requested the plaintiff to forthwith remove its poles

and wires from its streets as aforesaid, and that the complainant has refused so to do.

23 And further answering the complainant says that both before and since the bringing of this bill the defendant has demanded that the complainant altogether remove its poles and wires from the Town of Essex, and has threatened to compel it so to do.

Tenth. Answering the allegations contained in the tenth paragraph of the cross bill, the complainant says that the provisions of the laws of Massachusetts in respect to the matters therein set forth are contained in Section 26, of Chapter 122 of the Revised Laws of said Commonwealth, to which the complainant prays leave to refer.

Eleventh. The complainant admits that since the original bill was filed and the preliminary injunction issued, the complainant has made repairs upon its poles and line of telegraph and has re-set a few poles in different locations, but it denies that it has changed the line of telegraph from its original location upon said streets, and denies that it has done anything under the protection of the restraining order of this court which it had no authority to do.

By Its Attorney-, CARVER & BLODGETT.

At the same term, a Replication was filed by the Town of Essex on the twenty eighth day of March, A. D. 1903, and on the thirtieth day of said March, a Replication was filed by the New England Telegraph Company.

24 This cause was thence continued from term to term to the March Term of the District Court, A. D. 1912, when, to wit, April 17, 1912, the following Agreement as to Facts was filed:

Agreement as to Facts.

(Filed April 17, 1912.)

The parties agree that prior to the time of the filing of the bill, the plaintiff had erected and had up to that time for years maintained a telegraph line in the defendant town. The telegraph line was located on Western Avenue. Main Street and Eastern Avenue, is the only telegraph line of the plaintiff situated in the Town of Essex, and consisted of about 186 poles with a number of wires strung thereon.

At the time of the filing of the bill and for several years prior thereto there were seven wires.

There had previously been six wires. The telegraph line was four miles in length. The United States Government never contributed any sum toward the construction or care of the above mentioned highways. The Massachusetts Statutes have been introduced in evidence.

G. PHILIP WARDNER,
Attorney for Petitioner.
WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON.
Attorneys for Respondent.

This cause was thence continued from term to term to the March Term, A. D. 1913, when, to wit, June 23, 1913, this cause was set down for hearing on the pleadings and evidence and fully heard by the Court, the Honorable Frederic Dodge, Circuit Judge duly assigned to hold said District Court, sitting.

Said cause was thence continued under advisement to the June Term, A. D. 1913, when, to wit, August 14, 1913, an Opinion of the Court was announced, dismissing cross-bill and granting a permanent injunction, as prayed for in bill.

This cause was thence continued to the present September Term, A. D. 1913, when, to wit, October 27, 1913, the following Final Decree is entered:

25 *Final Decree.*

October 27, 1913.

DODGE, *J.:*

This cause came on this day to be heard upon the bill as amended and cross-bill, the respective answers thereto and the respective replications of the parties, all heretofore filed, as well as on the evidence of the respective parties as filed and presented to the Court, and having been argued by counsel for the respective parties, it is now, therefore, in consideration thereof and in accordance with the opinion of this court heretofore rendered, ordered, adjudged and decreed that a perpetual injunction issue in this suit restraining the defendant, its officers, agents and employees from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant; that the cross-bill be and it hereby is dismissed, and that complainant be allowed costs on the original bill and on the cross-bill.

By the Court:

CHARLES K. DARLING, *Clerk,*
By JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing Final Decree the defendant claims an appeal to the Supreme Court of the United States, and appeal bonds having been waived by the New England Telegraph Company of Massachusetts, said appeal is allowed.

A true record:

Attest:

CHARLES K. DARLING, *Clerk.*

26 *Opinion of the Court on Pleadings and Proofs.*

August 14, 1913.

DODGE, *J.:*

This bill was filed July 31, 1905. The defendant Town has been under a temporary injunction since Sept. 5, 1905, which it has never moved to dissolve. On Sept. 26, 1905, it filed a cross-bill against the plaintiff. This has been followed by an answer and a replication, as has the original bill.

Both plaintiff and defendant are Massachusetts corporations. The plaintiff was incorporated April 7, 1884, "for the purpose of constructing lines of aerial or underground wires of telegraph both within and without the limits of (the) Commonwealth and the owning, constructing, maintaining and operating lines of aerial or underground electric telegraph, both within and without the limits of said Commonwealth and the owning of interests in such lines," with a capital of $30,000. It is therefore a telegraph company within the meaning of Rev. Stats. Secs. 5263-5269, which are the laws of the United States under which the controversy between the parties, involving more than $2,000., is said to arise.

Sec. 5263 has given to any telegraph company, organized under the laws of any State since its enactment, the right to construct, maintain and operate lines of telegraph over and along any of the post roads of the United States which have been or may hereafter be declared such by law. It provides, however, that such
27 lines shall be so constructed and maintained as not to interfere with the ordinary travel on such post-roads.

Sec. 5263 gives priority over all other business, at such rates as the Postmaster General shall annually fix, to telegrams between the Government Departments, their officers and agents, in transmission over the lines of any telegraph company having the right of way provided for in Sec. 5263.

Sec. 5267 gives to the United States the right to purchase all the telegraph lines and property of any company acting under Sec. 5263, at an appraised value to be ascertained according to other provisions contained in the section.

Sec. 5268 requires the filing of a written acceptance, with the Postmaster General, of the restrictions and obligations required by law, before the exercise by any telegraph company of the powers and privileges conferred by Sec. 5263.

I find no other provisions in the sections referred to material for the purposes of this case. The plaintiff avers that it has filed the acceptance required by Sec. 5268, and has transmitted Departmental messages in accordance with Sec. 5263, and has in all other respects complied with the requirements of the sections referred to. These averments are sustained by the evidence.

The following facts appear by admission or from the evidence. After its incorporation in April 1884, the plaintiff constructed a telegraph line, about four miles in length, consisting of 186 poles and

wires thereon, carried through Essex from the line between it and the adjoining Town of Hamilton, through highways or roads within Essex known as Western Avenue, Main Street and Eastern Avenue, to the line between Essex and the adjoining Town of Gloucester. The line constructed formed part of a line constructed by the plaintiff through Massachusetts from the Rhode Island line to Rockport, passing on its way through various Massachusetts towns or cities which need not be specified. At Rockport it connects with a line of telegraph cable to Europe. At the Rhode Island line it connects directly or intermediately with telegraph lines constructed by telegraph companies in alliance with the plaintiff, affording telegraphic communication to points throughout the United States. It
28 was constructed to be and it has been since used as part of a system of lines in connection, affording telegraphic communication between these United States points and Europe, as well as between points on the connected lines within the United States. During the twenty-one years from 1884 to 1905, the plaintiff maintained and operated the line constructed through Essex as above, without interference on the part of that Town. The evidence does not show any interference by this line with the ordinary travel on the roads mentioned.

On June 1, 1905, repairs to the line through Essex having become necessary, and relocation desirable in connection with them, an application for a location through the roads above mentioned was presented to the Essex Selectmen. It was stated in the application that the new poles were to occupy practically the positions occupied by the old ones, and that any changes in the present location were to be under the direction of the Selectmen. This application was made in the name of the New England Telegraph Co. of New York, one of the companies with which the plaintiff was allied in the maintenance and operation of the through line above described. After a hearing, the Selectmen voted, on July 10, 1905, not to grant "the New England Telegraph Co." a location. Under date of July 11, 1905, they sent a notice to that effect addressed to "New England Telegraph Co., 84 State St., Boston, Mass." I find that their refusal to grant the application was not upon the ground that it was applied for in the name of the New England Telegraph Co. of New York instead of in the name of the plaintiff, but was a refusal, upon other grounds below appearing, to grant the plaintiff or any company connected with it, any location within the Town. At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town. Also that the Selectmen wanted the poles taken entirely out of the Town and would prevent construction work by force if necessary. The Selectmen or their Chairman were asked if there was objection to the repair of the line as it stood, merely replacing old poles with new

ones. The reply was, that there was objection, and that any
29 work by the company within the Town would be stopped.

The temporary injunction issued September 5, 1905, in this case, forbade the Town, until the further order of the Court, to interfere in any manner with the plaintiff's line or its relocation on the roads and highways then occupied thereby or with the resetting of its poles, or the making of necessary repairs. The defendant did not appear to oppose the granting of this injunction. The bill asks for a permanent injunction to the same effect.

In the cross-bill, filed by the Town on September 26, 1905, it is alleged that the plaintiff's line was erected without obtaining any rights whatever in the highways and roads mentioned, which were alleged and are admitted to be public highways; that the defendant had requested the plaintiff, since its bill was filed, to remove its poles and wires, which the plaintiff had refused to do; that it was trespassing upon the defendant's highways without right and without authority and was threatening to continue to do so; that it had, since the preliminary injunction issued, not only repaired its line, but had reset its poles in different locations, and that it had changed its line from its original location. The cross-bill asks that the plaintiff be ordered to remove its poles, and for an injunction forbidding the plaintiff to use its line within Essex for the purposes of its business until it shall have first obtained a franchise from the Board of Selectmen, as provided by the laws of Massachusetts. In the plaintiff's answer the request and refusal to remove are admitted, also the resetting of a few poles in different locations. The other allegations are denied. I find, on the evidence, that the admitted changes in the location of some of the poles were only such as were necessary to keep the line in a reasonably safe condition, and that there have been no changes amounting to a change of the location occupied in 1884 and since.

The defendant's contentions are based upon provisions contained in the Statutes of Massachusetts, Chap. 122, "Of Companies for the transmission of Electricity," in Sec. 1, authorizes any company incorporated for the transmission of intelligence by electricity to construct lines for such transmission upon and along the public
30 ways within Massachusetts under the provisions of sections which follow. Sec. 2 provides that the Selectmen of a Town through which lines of such a company are to pass "shall give the company a writing specifying where the poles may be located, the kind of poles and the height at which and the places whereon the wires may run," also that when the lines are erected, the Selectmen "may direct any alteration in the location or erection of the poles * * * and in the height of the wires," after an opportunity to be heard given the company, all specifications and decisions made to be put on the Town records. Sec. 26 provides that no enjoyment for the purposes specified in Sec. 1, for any length of time, of the privilege of maintaining poles or wires in, upon or over the land of other persons shall give a legal right to continue the enjoyment of such privilege, or raise any presumption of a grant thereof. There are also provisions in Chap. 25, Sec. 56, that the Selectmen of Towns

may authorize citizens of the State to establish and maintain, in their Town, poles, wires and other apparatus for telegraphic communication in conformity with Chap. 122. All these provisions were contained in the Public Statutes, superseded in 1902 by the Revised Laws, but in force from 1884 to 1902. The defendant contends that the plaintiff's right to construct or maintain its line in Essex depends upon these provisions, and that unless it can show authority under them, it was and is without any right either to construct or to maintain its line. It contends that the Acts of Congress referred to give the plaintiff no rights for those purposes in the public highways of the Town through which the line passes.

If these highways are "post-roads" within the meaning of Rev. Stats. 5263, the plaintiff's right under that section to construct, maintain and operate its line cannot be denied, the plaintiff having, as above shown, met all the requirements of the Federal Statutes upon which this right is made to depend. Whether the public highways here in question, or any of them, were established as post-roads by Rev. Stats. 3964, it is unnecessary to consider, because, subsequently to the Revised Statutes, on March 1, 1884, Congress enacted that

"all public roads and highways while kept up and main-
31 tained as such are hereby declared to be post-routes" (23 Stats. 3). That "post-routes" as there used means anything different from "post-roads," I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish Post-Offices and Post-Roads." In Western &c. Co. v. Penna. R. R. Co., 195 U. S. 540, 557, it is said that by the Acts of Congress, railroads within the United States were made "post-routes or roads." See also Western &c. Co. v. Richmond, 224 U. S. 160, 165, 166, where the Act of March 1, 1884, is cited with Rev. Stats. 3964 as having made all public highways post-roads. A recent District Court decision, Mackay Co. v. Texarkana, 199 F. R. 347, 348, refers to these enactments as "the post-roads Act and amendments thereto."

However it might be in the case of a telegraph company doing a purely private business, confined, for all purposes, within the limits of a State,—there can be no doubt that in the case of a company like the plaintiff, engaged in transmitting interstate, international and Government messages, the legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the States and with foreign nations, and also the operation of the national postal service.

While the plaintiff owes its existence, its capacity to contract, its right to sue and be sued and to exercise the business of telegraphy to the laws of Massachusetts, under which it is organized, it holds its privilege to run its lines through the post-roads referred to under the laws of Congress. Western &c. Co. v. Mass., 125 U. S. 530, 548. No State can exclude a telegraph company which has accepted the terms proposed by the national Government for this national privilege, from prosecuting its business within the State. Western &c. Co. v. Penna. R. R. Co., 195 U. S. 540, 562. It is true that the

authority granted by Congress to such a company is merely permissive, and gives no right to use the soil, even of post-roads, as against private owners or as against the State or municipality where it owns the land. Western &c. Co. v. Richmond, 224 U. S. 160, 169. No title is acquired by the mere exercise of the author-
32 ity granted, nor is any right of eminent domain included. A company exercising the authority may be required to make reasonable compensation to the municipality entitled, for the occupation of its post-roads. St. Louis v. Western &c. Co., 148 U. S. 92. The company is subject to the taxing power of the State, and to the imposition by the State of police or other regulations not inconsistent with those established by Congress. The taxes imposed, however, must not be of a character, nor the methods of collecting them such as to effect the exclusion of the company from the State or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the State or forbidding it to carry on its business therein. A State cannot so exclude or prohibit, either directly or indirectly. Western &c. Co. v. Mass., 125 U. S. 530, 548. Postal &c. Co. v. Adams, 555 U. S. 688, 696. And if the State cannot so exclude or prohibit, no town within the State can do so under State authority. To concede such power to a town might be, in some cases, to enable one town to shut out all telegraph wires from territory beyond it and not accessible save through it.

Ownership of the soil of these post-roads is not claimed by the defendant Town, which justifies its attempt to exclude the plaintiff, or stop the operation of its line within Essex, only by the claim that the company has never obtained a location for the line from the Town authorities, according to the State Statute. As has been stated, the specification in writing provided for by Chap. 122, Sec. 2, Rev. Laws, has been, though applied for, expressly withheld and refused since 1905; nor is the evidence sufficient to prove that such a specification was ever given the plaintiff by the Selectmen. None is produced by the plaintiff, nor is any record of one found in the Town records. But the laws of Massachusetts nowhere penalize or make illegal the construction of a telegraph line like this without the permit or specification. See Suburban &c. Co. v. Boston, 153 Mass. 200. And no failure on the plaintiff's part to do anything which the Town has the right to require under the Statutes, State or Federal, or can otherwise reasonably require as a condi-
33 tion of giving the specification, appears. The plaintiff has been, at least since 1905, constantly in the attitude of requesting the Town to give the specification.

Under these circumstances, I am unable to hold that the plaintiff is not lawfully occupying its location within Essex, or is not lawfully operating its line within that Town. In view of the Federal Statutes and their scope, I can find nothing in the Massachusetts legislation referred to, nor in the facts as shown, which can have the effect of abridging or restricting the plaintiff's rights to maintain and operate the line referred to.

The cross-bill must therefore be dismissed and a permanent injunction will issue as prayed for in the bill.

34 *Petition for Appeal and Supersedeas.*

(Filed October 27, 1913.)

To the Honorable Judge of the District Court of the United States for the District of Massachusetts:

Your petitioner the Town of Essex, conceiving itself aggrieved by the final decree of said District Court made and entered on October 27th, 1913, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors herewith filed, and prays that this appeal may be allowed and that the said decree may be suspended during the pendency of this appeal; that a transcript of the record on appeal including the finding of the Judge, upon which said decree was made, together with the decree, all duly authenticated, may be sent to the Supreme Court of the United States, and that said decree may be reviewed and reversed by the Supreme Court of the United States and that your petitioner may be given such further relief as may be proper in matters of this character.

TOWN OF ESSEX,
By Its Attorneys, WILLIAM B. SULLIVAN.
FRANK C. RICHARDSON.

Assignment of Errors.

(Filed October 27, 1913.)

The Town of Essex respectfully says that the decree made and entered in this case on the 27th day of October, 1913, ordering a perpetual injunction to issue as prayed for in the bill and dismissing the cross-bill of the Town of Essex, is erroneous and hereby assigns as error in making an entry of said decree the following, to wit:

1. That the court erred in granting said injunction as prayed for, whereas it should have dismissed said bill.

2. That the court erred in dismissing the cross-bill of the Town of Essex, whereas it should have granted to the Town of Essex the relief asked for.

3. That said decree is erroneous in that it holds that the following Statutes of Massachusetts in force at the time the line of the New England Telégraph Company of Massachusetts was erected are unconstitutional, and in that said Massachusetts Acts are unreasonable and repugnant to the Acts of Congress of July 24, 1866, or the Constitution of the United States:

35 Public Statutes, Chap. 109, § 1:

Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter.

Public Statutes, Chap. 109, § 2:

Each company may under the provisions of the following section construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the Commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters.

Public Statutes, Chapter 109, Section 3:

The Mayor and Aldermen or Selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts and the height at which, and the places where, the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.

Public Statutes, Chapter 27, Section 49:

The Selectmen of the town may empower citizens of Massachusetts to establish and maintain in such town posts, wires and other apparatus for telegraphic and telephonic communication in conformity with the provisions of Chapter 109.

Public Statutes, Chapter 109, Section 15:

No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued en-
36 joyment of such easements or raise any presumption of a grant thereof.

4. That said decree is erroneous in that it holds that the following Massachusetts Statutes contained in the Revised Laws of Massachusetts in force when the bill was filed, are an unreasonable regulation and are repugnant to the Act of Congress of July 24, 1866, or the Constitution of the United States:

Revised Laws, Chapter 122, Section 1:

A company which is incorporated for the transmission of intelligence by electricity, or by telephone, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating, or power, except lines for heat or power by a street railway company, may, under the provisions of the following sections, construct lines for such transmission upon and along the public ways and across any waters within the Commonwealth, by the erection of the poles, piers, abutments and other fixtures, except bridges, which may be

necessary to sustain the wires of its lines; but shall not incommode the public use of public ways nor endanger or interrupt navigation.

Revised Laws, Chapter 125, Section 56:

Selectmen may authorize citizens of the Commonwealth to establish and maintain, in their town, poles, wires and other apparatus for telegraphic and telephonic communication, in conformity with the provisions of chapter one hundred and twenty two and other laws applicable to telegraph or telephone companies.

Revised Laws, Chapter 122, Section 2:

The mayor and aldermen of the city or the selectmen of a town through which the lines of a company are to pass, shall give the company a writing, specifying where the poles may be located, the kind of poles, and the height at which, and the places where the wires may run. After erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the poles, piers or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.

37 Revised Laws, Chapter 122, Section 26:

No enjoyment for the purposes specified in Section 1 of this Chapter (constructing lines for the transmission of intelligence by electricity) by a person or corporation for any length of time of the privilege of having or maintaining poles, wires or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement, or raise any presumption of a grant thereof.

Acts of 1903, Chapter 237:

The Mayor and Aldermen of a city or the Selectmen of a town through which the lines of a company are to pass shall give the company a writing specifying where the poles may be located, the kind of poles, the height at which, and the places where the wires may run. Any company, except street railway companies, desiring permission to erect poles, piers, abutments or other fixtures upon or along any public way shall, in writing petition the said Mayor and Aldermen or Selectmen therefor. A public hearing shall be held on such petition, and written notice of the time and place at which such hearing will be held shall be mailed at least three days before said hearing, by the clerk of the city or town in which the petition for locations has been made, to the owners of real estate along the ways or parts of ways upon which it is proposed to construct said line, as determined by the last preceding assessment for taxation. The clerk of the city or town shall endorse upon the order or specification of locations granted, his certificate that notices were sent and a hearing held as herein provided, and no such order or specification shall be valid without such certificate. After the erection of the lines the mayor and aldermen or selectmen may, after giving the company or its agents an opportunity to be heard, or upon petition of the com-

pany without hearing or notice, direct any alteration in the location or erection of the poles, piers or abutments, and in the height of the wires; and no permit shall be required for renewing, repair-
38 ing or replacing poles, piers, abutments or other fixtures once erected under the provisions of law. Such certificates, specifications and decisions shall be recorded in the records of the city or town.

5. That said decree is erroneous in that it holds that said Massachusetts Statutes are not a reasonable regulation within the Police Power of the State of Massachusetts, and are repugnant to the Act of Congress of July 24, 1866, and the Constitution of the United States.

6. That said decree is erroneous in that it holds that the Act of July 24, 1866, authorized private telegraph companies to do that which the people in adopting the United States Constitution did not give Congress the right or authority to do in behalf and for the Government of the United States of America.

7. That said decree is erroneous in that Congress has no authority under the Constitution to establish a telegraph company and had no authority to grant to a telegraph company the property of the United States or of any of its citizens.

8. That the Post Road Statute is confiscatory of property and rights without providing compensation, and that said decree is erroneous in that said Post Road Act is unconstitutional.

9. That the decree is erroneous in holding that the Post Road Act was intended to confer a franchise upon the New England Telegraph Company of Massachusetts and other companies accepting the provisions of that Act in such a way as to put it beyond the power of the state in which the poles and wires were to be located to make any laws that would regulate the location of said poles or wires.

10. That the decree is erroneous in holding that Congress had the right to exercise exclusive legislation over the highways in the Town of Essex in the State of Massachusetts, on which the telegraph lines are laid under the Constitution of the United States in passing the Post Roads Act, because there is no finding that the National Government purchased said highways by the consent of the Massachusetts Legislature.

11. That the entry of said decree is erroneous in that it was based on the finding that "there can be no doubt that a company like the plaintiff, engaged in transmitting interstate, international
39 and government messages, the legislation of Congress so far as it has gone, is supreme, because of the powers of Congress to regulate for the whole nation its commerce between the states and with foreign nations and also the operation of the national postal service", as Congress is nowhere given the power in the Constitution of the United States to grant rights in the highways of any state to companies like the plaintiff, being subject to regulation and supervision by the State Legislature acting within its Police Power.

TOWN OF ESSEX.
By Its Attorneys, WILLIAM P. SULLIVAN.
FRANK C. RICHARDSON.

Waiver of Appeal Bonds.

(Filed Oct. 27, 1913.)

Now comes the New England Telegraph Company of Massachusetts and waives the giving of all bonds herein; this waiver not to effect the temporary injunction heretofore issued in this case.

NEW ENGLAND TELEGRAPH COMPANY
OF MASSACHUSETTS,
By G. PHILIP WARDNER, *Its Attorney.*

Order Allowing Appeal.

October 27, 1913.

DODGE, *J.:*

This day the Town of Essex presented its petition for the allowance of an appeal in the above entitled action to the Supreme Court of the United States, which prayer for appeal is hereby allowed.

As the New England Telegraph Company of Massachusetts has waived the filing of an appeal bond no such bond need be given.

By the Court:

CHARLES K. DARLING, *Clerk.*

40 District Court of the United States for the District of Massachusetts.

No. 32. Equity.

NEW ENGLAND TELEGRAPH COMPANY
v.
TOWN OF ESSEX.

Condensed Statement of Evidence.

(Filed Dec. 22, 1913.)

The New England Telegraph Company is hereinafter called the Company, and the Town of Essex is hereinafter called the Town.

Charles P. Bruch, Treasurer of the Company, testified that the telegraph line in the Town was constructed about 1884, and since that time had been operated and maintained by the Company; that the Company had no lines or property outside of Massachusetts; that there was another telegraph company, named the New England Telegraph Company of New York, which Company, however, had no telegraph lines or other property in Massachusetts, and did no business therein and had nothing whatsoever to do with the construction, operation and maintenance of the line of telegraph of which the line in Essex was a part; that so far as the public was concerned the New England Telegraph Company of Massachusetts did

its business under the name of Postal Telegraph Cable Company,
Postal Telegraph, or Postal Telegraph system, or Postal Tele-
41 graph Commercial Cable system; that there were a large number of corporations organized under the laws of the various states, all doing a commercial telegraph business for the public, or the United States Government and in the course of that business handling telegrams not only between various states and within the states, but also collecting and transmitting and delivering cablegrams between the United States and foreign countries; that in order to identify this business as a business of one telegraph system, these companies use, in dealing with the public, the above mentioned names; that so far as the construction, operation and maintenance of the line was concerned, and so far as the relations of the company with the towns and state were concerned, it had always used the name of New England Telegraph Company of Massachusetts in all formal transactions; that its returns to the state were made in that name; that the business done over the line of the Company was the handling of telegrams for the public, the handling of cablegrams to and from the cable terminus at Rockport, and the handling of government telegrams, the transmission of news matter, market quotations, and such business as is usually offered to a public telegraph company; that the line of the Company extended from the state line between Rhode Island and Massachusetts to Boston, and to Rockport, Massachusetts; that its line was a link in the system for transmitting cable messages from New York and points west of New York to Europe, and messages from Europe to the United States, to New York and points west of New York, and to Boston and points in Massachusetts; that a message travelling east from Chicago for
42 Liverpool would probably pass through New York and over this line; that about 600,000 cable messages pass over this line in a year; that a break in the line of this Company would deprive the cable system of a very important part of its facilities.

On cross examination the witness testified that he did not know of his own knowledge whether the Company had a permit to go through the Town because the line was built before he was connected with the Company; that the minute book of the Company did not contain any record of the location in Essex except a record in 1885, of a report by the President that since the organization of the Company five wires have been strung east from Boston to Rockport, Massachusetts; that the Company's application under the name of the New England Telegraph Company of New York for a permit in the year 1905, must have been merely a slip of the pen as the New England Telegraph Company of New York had never had anything to do with this line so far as he was aware, nor ownership in it, and that the only incorporation of the Company was the one of April 7, 1884.

On re-direct examination the witness testified that the minute book did not contain minutes of permits of any but very few towns as it did not appear to have been the custom to make a record in the minutes of the transactions of directors and stockholders of any of the permits that were obtained through the towns.

EDWARD B. PILLSBURY, superintendent of the Company,
43 testified that through an error in dictating the application to the authorities of the town, the application was in the name of the New England Telegraph Company of New York, but in fact was for the Company; that he had no connection with the New England Telegraph Company of New York either as an officer or a stockholder, or in any other way; that the application for a location referred to was made with reference to the line of telegraph which then existed and now exists in the Town of Essex; that about half of the messages sent from Chicago to Liverpool handled by our system would go over this line and about one-half of the messages from points in Europe to the United States over the Commercial Cable system would go over this line; that in the year 1905, the Company undertook to make some new construction, repair or relocation or re-setting of its line in the Town of Essex; that the line was weakened very much and unreliable for traffic as well as unsafe for the travelling public; that since the original construction the local conditions had changed by the growing up of trees, the construction of new driveways and new buildings, so that the line as originally constructed did not fit the new conditions and re-construction was therefore necessary; that a large number of the poles were very badly decayed below the ground; that many of the guys were almost rusted off and many of them had been cut off by the abutters; that there was cross arm construction for the whole distance through the Town of Essex; that some of the poles reached the unusual height of 75 feet in order to clear trees, and extensions had been put on a number of other poles when the company was unable to obtain longer poles; that such a method of con-
44 struction was a source of weakness and unsafety; that the 75 foot poles were always a source of danger; that he made an application to the town for permission to re-locate and re-build the line through the town; that he did not know whether his men actually started in to make any changes before he made such application; that the application signed "New England Telegraph Company of New York by E. B. Pillsbury, Superintendent, for a location in the Town of Essex" which was introduced in evidence and marked "Complainant's Exhibit 3" and a copy of which is hereto attached, was the original application he had made for the re-location he had spoken of; that the asking in this application for a location in behalf of the New England Telegraph Company of New York was an error of nomenclature: that the line he had in mind was the Company's line, running through the Town of Essex; that he had no intention of getting any new location for any other company than the Company, the application stating that the new poles were to occupy practically the positions occupied by the old poles; that a relocation was what was really desired of the Company's line; that after this application was made he had a talk in his own office with two of the selectmen and their counsel, namely, Mr. Cogswell, Mr. Kimball and Mr. Richardson; that Mr. Ryan, foreman of the construction department of the Company and Mr. Wardner, its counsel, were also present; that this talk took place in the summer; that

counsel for the selectmen stated that the board desired to have the poles of the Company taken entirely out of the town; that the board would not grant the company's petition and that if the Com-
45 pany undertook to do any construction work on the line, the town would prevent it if necessary by force; that counsel for the board stated that the fact that the petition appeared to be for the New England Telegraph Company of New York would not be a matter of contest; that Mr. Wardner asked one of the selectmen in regard to the point that a location rather than a relocation was asked for in the petition and that the reply was that the town would grant neither a location nor a relocation; that one of the selectmen said that it was not any question of technicalities, but a question of the right of the company to be in the town at all; that one of the selectmen stated that they were not going to have the Company in the town at all; that he was under the impression that the Company had done some construction and made some changes since the conference; that the line was then in good condition; that it had not been relocated in any part; that poles had been renewed and wherever it was found necessary new wire was put in and also new cross arms; that before the application was made the line was so weak that a violent wind storm was liable to blow it over, or the giving way of a guy on a corner pole would allow the line to fall into the street and this did actually happen just prior to the application for permission to rebuild, resulting in the blocking of the street and stopping the trolley cars after dark; that if telegraph wires became crossed with trolley wires, there is great danger to life and property besides interrupting the telegraph company's traffic; that the effects of crossing wires may be felt for hundreds of miles; that fires may be set and have been set from this cause.

On cross examination the witness testified that what he
46 really meant to sign was "The New England Telegraph Company of Massachusetts"; that he had claimed all along that the Company had a location in the streets. Asked how it happened that he did not say "relocation," he replied that he did not attach any importance to it; that he did not think it was of consequence; that there was no permit to locate the poles in the town in the Company's Boston office; that he had caused search to be made in New York and was told there was no permit in the book where the permits are ordinarily kept for Massachusetts towns; that his reasons for making the application to the town were to preserve the integrity of the line, that is, to make it stronger physically, to secure the co-operation of the town authorities in such work as might be necessary, and to complete his office records of town permits in Massachusetts; that the reason for any of the records being in New York was that New York is the headquarters of the executive offices of the entire system, as previously explained; that he had made another application for a permit to locate or relocate a line in the town of Essex before the application covered by Exhibit 3 was made; that the conference referred to with the selectmen and counsel in the witness's office took place, he thought, in August; that the application referred to in Exhibit 3 was made on February 3, 1902;

that the other application he referred to was not made before this one, but on June 1, 1905, and it was in the name of the New England Telegraph Company of New York; that it was apparently copied from Exhibit 3, merely changing the dates; that the application of 1905 was the only one the Town of Essex had ever refused to the witness in writing; that he understood the refusal of
47 the town dated July 11, 1905, referred to New England Telegraph Company of Massachusetts; that since 1899 he had received no formal communication from the town excepting the communication dated July 11, 1905; that since 1899, acting for the New England Telegraph Company of Massachusetts, he had made the two applications referred to, both of which were in error signed in the name of the New York corporation.

"Q. Has the New England Telegraph Company of Massachusetts ever made an application for a permit to locate or relocate its line through the town of Essex since 1899? Do you understand that question?

A. Not entirely; do you mean written or verbal application?

Q. In writing.

A. Not to my knowledge.

Q. Then the town of Essex has never refused the New England Telegraph Company of Massachusetts a permit to locate or relocate its lines through the town of Essex has it?

A. Do you mean written or oral?

Q. I said in writing.

A. I have never received one which specifically stated New England Telegraph Company of Massachusetts."

On re-direct examination the witness testified that he recognized Exhibit 3 not as the application which was made to the town of Essex and which was refused and which was the subject of the litigation, but as being a prior application referred to in his testimony; that the application of which Exhibit 3 was a copy was sent in to the town, but he received no notice of action by the board of selectmen; that the paper introduced in evidence as complainant's Exhibit 4 is a copy of Defendant's Exhibit I, which is hereto attached, and is the application which he made to the selectmen of Essex in the spring or early summer of 1905; that a letter dated June 22, 1905, from the Town Clerk of Essex addressed to the witness, introduced in evidence as complainant's Exhibit 5, a copy of which is hereto attached, was undoubtedly received by him; that a letter addressed to the New England Telegraph Company, 84 State Street, Boston, dated July 11, 1905, from Aaron Cogswell, Chairman, introduced in evidence as complainant's Exhibit 6, a copy of which is hereto attached, was received by him; that the application dated June 1st was made by the Company which owned the property.

48 GEORGE F. BARTLETT testified that he was employed by the Company in 1884 in the capacity of constructor, assistant superintendent and right of way man, that is, a party attending to the soliciting of rights of way through towns; that he attended to

procuring rights of way through towns for the Company; that he applied to the town of Essex for the right of way; that the application was in writing; that he last saw it in the hands of Mr. Bartlett who was chairman of the selectmen of Essex; that he prepared the application himself; that it was written as any prayer or petition for right of way, but it contained the location of streets through which the line was to pass; that it was presented somewhere in June or July, 1884, before any line was constructed; that it was presented at Mr. Bartlett's house; that he took dinner with Mr. Bartlett and in the afternoon they had the two selectmen confer with Mr. Bartlett and the witness; that the two selectmen came up to the house; that they talked the matter over and Mr. Bartlett told the witness that the petition would be granted; that the line through the town of Essex was the line of the Company.

On cross examination the witness testified that he left the application with Mr. Bartlett, chairman of the board of selectmen to be recorded; that he didn't know whether Mr. Bartlett sent the permit to Mr. Robeson, the superintendent of the Company; that he didn't see the permit signed by the selectmen and had no personal knowledge that it was ever signed.

On re-direct examination he testified that no one made any objection to the building of the line through the town of Essex so far as he knew.

49 JOSEPH ATCHISON testified that in May, 1884, he was inspector on the line of the Company that was being built until the line was completed in the fall or winter of that year, and then was employed as superintendent; that he remained superintendent until succeeded by Mr. Pillsbury, about 1898 or 1899; that he first heard of there being any question as to whether the Company had a right of way through the town six or seven years after the Company began to operate in 1885, that is, somewhere after 1891 or 1892, along there; that thereupon he sent a man named P. S. Fisher, who was his foreman, but who is dead, down to investigate and Fisher reported that the pages of the records had been destroyed or torn and for that reason the witness could not get the information he wanted; that when the electric railway was built through Essex he received a notice from the selectmen to move the poles out of the way of the electric road and permission was asked to re-locate the line; that the selectmen would not give the Company anything in writing, but gave it a verbal permit in the presence of two witnesses, to wit, Thomas McCaffrey, the foreman, and another man whose name the witness did not remember; that the line was relocated in consequence of that permission and McCaffrey did the work; that when the line was constructed he heard no objections from anyone; that he heard no objections for six or seven years after the line was constructed.

On cross examination he testified that the investigation when it was reported that a leaf had been torn out of the book, took place six or eight years prior to the time of the witness's testifying; that
50 the man he sent down to look over the records to find the permit was merely under the supposition that the permit was

on a leaf that was missing in one of the record books; that he had no personal knowledge of the Company's having had a permit to relocate its line when the electric railroad went through Essex only what was reported to him, that is, that the selectmen orally refused to grant a permit in writing but had given their oral consent to the Company's having a permit.

It is admitted that the Farmers Loan and Trust Company of New York owns the entire capital stock as of record on the books of the Company.

THOMAS MCCAFFREY testified that he went to work for the Company in 1885 and remained in their employ ten years as operator and lineman in charge of a section of the lines from Lynnfield to Rockport; that when he went into the Company's employ there were 200 poles in the town; that there were no anchor guys; that down to the time the electric railroad came into the town he put about ten new poles into the line and added five new guys, some of which were anchor guys and some of which were fastened to trees or other poles; that when he went to work for the Company there were five wires, four of them strung on a cross bar and one on the pole bracket under the arm; that later one wire was added; that a new cross arm was put up and the new wire and the one that had been on the bracket was strung on the cross arm; that when the electric railroad came through the town, he went over the route with Mr. Kimball, one of the selectmen, and had him point out where the witness might move the poles that were in the way of the Railway track; that Mr.
51 Kimball pointed out to him where to set the poles; that he did not think he made any effort to get a permit for this relocation in writing from the selectmen; that he declined to move any poles until the selectmen would show him where he could put them; that he then moved about half the poles in the town; that he had to put in side arm construction, especially at Essex Falls, on account of some large trees that were too high to get over and not room enough between the trees and the railroad track for the line; that the side arms were put on to extend and carry the telegraph wires above the trolley wires; that the shortest of the new poles he put in was 65 feet and the longest 69; that he had to put in such high poles to carry the wires above the trees; that the shorter poles are very much stronger and safer, but the big poles were used to avoid injuring the trees.

On cross examination the witness testified that the object of moving the poles was to give clearance for the cars to run on the tracks; that the object of moving the poles was principally on account of their being in the way of the running of the cars of the electric road; that the track was too near the poles; that he had heard that the selectmen of the town denied that the Company had a location in the streets of the Town.

ELIJAH HEBB testified that he was foreman for the Company and in its employ, and had been for eighteen years as lineman and foreman, most of the time foreman; that he repaired the line in the town of Essex in 1901 and 1902; that he first saw the line in 1885 and from time to time after that down to 1902; that he strung an
52 additional wire, making seven in all, on the line in 1897; that there were about 200 poles in the line; that when he first saw the line the construction was poor—poles and wires through there—no line—don't call it a telegraph line—every old way—no proper construction—the poles moved back and others set out and as a line it was no good; that the poles averaged from 30 to 65 feet—he should say on an average 35 feet—every fifth pole guyed—averaged more than that probably; that this was always the condition of the line while he knew it; that in 1902, he started to rebuild the line from Rockport; that he got up into Essex to a point near Lufkin Street; that he finished up his work for that season and his intention was to get a new right of way, trying to cut across private property, that he finished temporary repairs right through to Hamilton; put up perhaps half a dozen new poles through the town and tried to buy a right of way and could not do it and got the selectmen out and went over the route and made a temporary survey and temporary locations to rebuild. This was in February, 1902; that he presented the application (Exhibit 3) to the town clerk; that he saw all three selectmen about it; that he took them over the route in a carriage and told them that he wanted a re-location of the poles all through the town; that they claimed that the Company did not have any permit or franchise through there and he presented the petition; that Mr. Story, one of the selectmen, said he should not sign it and the other two did not say whether they should or would not; that he, the witness, went away after that and did not come back; that
53 the other selectmen were present when Mr. Story said he would not sign; that this took place in regular town meeting on Monday night; that the petition was presented at that meeting and read in the witness's presence; that the Town Clerk presented it to the board; that there was discussion and the petition was laid on the table for further consideration at June meeting; that Mr. Story made a claim we had a line of poles through there and that was enough; that before he presented the petition he went over the route with all the selectmen together and pointed out where he wanted to be located and they agreed if he could get located that would be the proper place; that as to the need of repairing the line, relocating or resetting the poles or restringing the wires, it was needed; that the poles were old and worn out, decayed at the ground, decayed at the top; cross arms worn out; guys rusted and worn out; could not repair unless put in new poles; the poles were not set in lines either on curves or on straight; the poles were set in two or three feet where the bank was dug away and shoved back from the track and filled in around and did not pay any attention to lining them up; put one pole two feet and another back a foot; one top to one way and one another, and the poles were decayed so at the top you could not do anything with them, and the only proper way to

do was putting in new poles and wanted to get them in line; that the line was crooked and the road was crooked and the line had to be straightened and relocated and even if that was not done, the line was in a very bad state of repair and needed resetting.

The witness then stated in detail the specific places in the line which were in bad condition and needed repairs, re-location, re-setting and restringing.

54 The witness further testified that the line was safe *in* a nice mild day, but for any severe storm, or in a common wind storm it was dangerous. Nothing there to hold it up; that it was liable to fall down; that the poles were decayed and everything was weak and worn out and that for a large part of the distance through Essex it was in close proximity to a trolley wire so that if the wires crossed with the trolley wire, fires would probably be set; that it was dangerous to an operator, to a lineman, to public travel, to anybody; lines coming down; lots of people get killed with wire; horses get killed; a man working on a pole might get killed; don't know where it is coming from.

On cross examination the witness testified that the meeting of the board of selectmen at which he presented the petition referred to was held on the Monday night preceding the 22nd of February, 1902; that it was a meeting of the board of selectmen, not a town meeting; that Mr. Goodhue, Mr. Cogswell and Mr. Story and the town clerk were present; that he might be mistaken about Mr. Story; that the man he referred to was a ship carpenter; tall man who lived up towards Hamilton, and that if this was Mr. Goodhue, it was the man that said he would not grant the petition; that they talked the matter over and laid the petition on the table for further consideration, and as far as he knew they never took any action; that he supposed the company had a right to be in the streets, but as far as he was concerned he did not know whether they had any rights or not; that he did not know the town had denied the company the right to come there, but supposed the company had a right of way there.

55 WILLIAM RYAN testified that he was foreman of construction for the New England Telegraph Company of Massachusetts and had been for sixteen years; that there was no other feasible route over public highways through the Town of Essex going directly towards Gloucester than that which the line occupied; that he first went over the line in 1885 and had known it off and on since; that he was connected with the maintenance department and that it was up to that department to make the line safe from Boston to the point where Mr. Hebb left off; that the witness rebuilt and relocated the line in the City of Everett because the poles were worn out; that he repaired it through Malden, Saugus and Danvers; that in Essex he found it in the same condition as in Everett; that the line was beyond repair; that he came back and reported it was waste of money to spend on it as repairs as it needed new poles and a great number of poles re-located; that an effort was then made to obtain a private right of way, but a private right of way was found not to be obtain-

able; that in 1903 and 1904 he laid out the material for a new line in Essex, Hamilton and Wenham; that when he started to rebuild in Essex he consulted the selectmen regarding relocating the poles and was advised by them to bring a petition; that he consulted with Mr. Pillsbury and received from the latter the petition introduced in evidence as Exhibit 1 and delivered it to one of the selectmen;

56 that each abutter was notified and a date set for a hearing on the petition; that the witness attended the hearing; that the sense of the meeting was that the selectmen should not grant the petition; that the people knew what the petition meant, what the Company meant to ask for and why the petition was presented; that he saw complainant's Exhibit 6 in Mr. Pillsbury's office the day after he received it; that he thought June 30, 1905, was the date of the meeting referred to; that between June 30th and July 11th he had several interviews with the selectmen; that Mr. Cogswell said there was a general feeling of the town against the Company and they did not see their way clear to grant the petition; that outside of the board of selectmen and their attorney, he didn't see anybody that objected to the company's having its poles and wires in the town when he met them individually; that they never said anything to him about it; that he called on the chairman of the board a second time and interviewed selectman MacKenzie, who said personally he had no objection to the Company's having poles and wires in the town, but the rest of the board was against it; that he, the witness, asked the chairman of the board if he had any objection to the Company's going ahead and repairing the line as it stood, replacing the poles, and new poles, and he said that he had; that if the Company made any attempt to do any work in the town, the town would find a way to stop it, and that the witness took the chairman to mean that he would have the gang arrested; that at the meeting held on the petition he recollected that either the chairman of the board or Mr. Richardson, counsel for the town, asked the witness if this was a foreign corporation, and also what was meant

57 by asking for a location instead of relocation of the poles, and that the witness stated to the board and to the assembly that those were clerical errors; that perhaps he was responsible for them in not giving the proper information to Mr. Pillsbury who had written it, and he requested that the application be returned to him so he could have corrections made and was told that that was not necessary; that he took the responsibility of the error of having the word location instead of relocation in the petition and explained to the best of his ability the reason that the Company had a petition and why it petitioned and where the poles stood and where the Company wanted them and why it wanted them changed; that there is no question the selectmen understood what the Company wanted, as he had explained to each one individually; that at the conference held in Mr. Pillsbury's office at which Mr. Richardson, Mr. Cogswell, Mr. MacKenzie, Mr. Kimball, Mr. Pillsbury, Mr. Wardner and the witness were present, in August, 1905, Mr. Richardson told Mr. Pillsbury that they did not propose to have any poles of the New England Telegraph Company in the town on any

street if they could prevent it, and that Mr. Kimball spoke up after Mr. Richardson finished and said there were not any streets they wanted the Company to use in the Town of Essex; that he heard Mr. Richardson ask Mr. Pillsbury if he had any papers to show the Company had permission to set poles in the town; that in answer to this question Mr. Pillsbury stated that although the papers could not be found, he had always supposed that they had; that the witness or Mr. Pillsbury then claimed that aside from the town location the Company had a federal right to build on post roads; that to sum up the whole conference, it was settled this way: That the Company could not set any poles in the Town of Essex unless the court said so; that he remembered Mr. Wardner's asking one
58 of the selectmen about the fact that the word location instead of relocation was used and the name "Telegraph Company of New York" instead of "Telegraph Company of Massachusetts" and the reply was that it did not make any difference what Company we was, they should not grant to any Company; that is what Mr. Richardson said and the witness thought Mr. Kimball; that after this conference he talked with Mr. Cogswell and told him that Mr. MacKenzie had consented to go and show the witness where to put the poles if Mr. Cogswell would do so and that Mr. Cogswell refused; that this was a few days after the injunction had been granted; that Mr. Kimball when spoken to about the matter said "We haven't got anything to do with it now" and Mr. MacKenzie didn't want to take the responsibility unless the other selectmen would consent to go and the other selectmen would not, so the Company started to repair the line and consulted the abutters principally and placed the poles as far as it could agreeably to the wishes of the abutters; that prior to the granting of the injunction the line was worn-out; several of the poles were rotted off entirely at the bottom near the ground; a large number of them were decayed at the tops. The construction generally was lower than the standard of the Company; that at the time the trolley line was built a number of the poles were moved nearer the trees, which made it necessary to side-arm, as it is called; that is, arms projected from the pole, rather than to put on the poles square, which is considered weak construction; that he found the line also had been crowded a good deal by shade trees, some having been planted since the line was
59 built and grown up directly under the line and annoying the owners of adjoining property when the wires were cleared; that he had promised to relocate the poles as soon as it was practicable, provided the selectmen would allow it and the conditions required it. The witness then stated in detail and specifically the need of repairing, resetting, relocating and restringing the wires in the various portions of the line and what the Company had done since the granting of the injunction to put the line in a proper condition.

On cross examination the witness testified that at the meeting held on the petition he asked the selectmen if they wished him to bring the application back to Mr. Pillsbury. They said that it did not make any difference—did not matter. They would not con-

sider any application; that he did not intend to say in his testimony as to what took place after the injunction that he ever got permission to remove poles and change them to another place from the selectmen; that what he did mean was that he located some of the poles in accordance with the wishes of the abutters; that he attended the hearing given by the selectmen on June 30, 1905; that the chairman stated fully and fairly the object of the meeting, which lasted nearly an hour; that there was ample opportunity for everybody who wished to express their sentiments; that it was the unanimous vote of those present that the selectmen should not grant the petition.

On re-direct examination the witness testified that what took place at the meeting was that the chairman made no remarks, but put the question he was asked to by somebody on the floor. They were asked to hold up their hands, those that thought the petition
60 should not be granted and a large number held their hands up. The witness did not know as all, but the majority—but he thought it was unanimous; that this was after Mr. Richardson's speech.

On re-cross examination he testified that at the conference in Mr. Pillsbury's office when Mr. Pillsbury was asked either by Mr. Richardson or one of the selectmen why he did not go down the railroad track where the Western Union Telegraph poles go and thus avoid going through the streets of the town nearly the whole length of the town, Mr. Pillsbury replied that it was impossible for the Postal or New England Telegraph Companies to use the property of the Boston & Maine as they had a contract with the Western Union which gave the Western Union control.

HENRY H. HAZELTON testified that in 1884 he was employed by the Company as foreman building the line from Boston to the junction of the Gloucester and Rockport Line; that he heard no objections from anyone in the town of Essex when he was building the line; that there was no other feasible route through the Town of Essex from the Hamilton Line, going to Gloucester, on the public highways than the one adopted; that in building the line no guys at all were used; that four wires were strung and the poles were from 30 to 35 feet high; that it was all cross bar construction and no bracket; that guys are regarded as necessary construction
61 today. All heavy lines use guys; that he left the Company's employ in 1884 after the line was built.

It is agreed that the Company and the New England Telegraph Company of New York have duly accepted the provisions of the Telegraph Act of Congress.

EPES SARGENT testified that he was Town Clerk of the Town and had been such continuously since 1896; that he was present at the hearing that was held in Essex June 30, 1905, on the petition of the New England Telegraph Company of New York; that he notified all the abutters on the line, very nearly 135, of the hearing; that

defendant's Exhibit A, a copy of which is hereto attached, was a copy of said notice which was dated June 26, 1905; that he received several letters, copies of which were introduced in evidence and marked respectively Defendant's Exhibits "E," "F" and "G," copies of which are hereto attached, from non-resident abutters, saying that they had received the notice and what they wished done; that the meeting was held on June 30, 1905, and Mr. Cogswell first read the petition and in his remarks said that he referred to the big poles—tall poles; that the question was whether the Town should grant a permit or location; that most of the answers were "No"; that A. D. Story said "No new poles—old ones removed"; that he had charge of all town records except the assessors' books and the records
62 kept by the selectment of their doings which they kept in a small book of their own; that he had examined the records from 1861 down to 1902, and had not been able to find any record of a location being granted to the New England Telegraph Company of Massachusetts or the New England Telegraph Company of New York; that he had examined the records from 1861 to 1902, to see if there had been any leaves or any leaf torn out of the records and found no leaves torn out—no mutilation of the record; that he had looked over the record for the year 1884 the previous Sunday and found everything straight; found it intact; that he was acquainted with Daniel W. Bartlett, deceased, who was chairman of the selectmen and heard Mr. Bartlett say that the Company had no rights to go through the town. An affidavit of the witness as town clerk was introduced and is hereto attached as Defendant's Exhibit H.

On cross examination the witness testified that he had sent the notice to nine non-residents; that the meeting of June 30, 1905, was called to order by Chairman Cogswell who said in response to some statement from the floor that the petition referred to the big poles; that he did not understand Mr. Cogswell to mean that what was wanted was a new line of telegraph in addition to the poles there, but that Mr. Cogswell wanted to distinguish them from the poles of the other companies, the telephone company and the electric railroad, which were a great deal shorter than the poles of the
63 Company; that he understood Chairman Cogswell wanted to have the meeting understand that the petition referred to the Company that had the big poles there as distinguished from the others; that he understood A. D. Story to refer to the Company that had their poles there; that Mr. Ryan was present at the meeting and said that he thought the use of the name of the Telegraph Company of New York must be a mistake and that he thought that the application asking for a location instead of a relocation was an error too; that Mr. Ryan made it plain to the witness that really what was wanted was a relocation of the poles of the Company that were then there in the town; that the records produced contained all the records relating to the town meeting, but did not contain the records relating to births, marriages and deaths, dog licenses, mortgages and bills of sale and liens; that he had not examined the last named books; that they had rural free delivery in Essex since July, 1905;

that prior to that time the mail came to the Post Office; that the Post Office was on one of the main streets upon which the telegraph line was located; that as a matter of fact the mail was brought in the front door of the Post Office on Main Street upon which the Company's line was located.

64 EVERETT B. JAMES testified that he was a selectman of the town for five years and was on the board the year the electric railway was being built in 1895; that where they had surveyed it would interfere with a few poles and that the orders of the selectmen were to move these poles so that the track could be laid; that neither he nor Mr. Kimball, another selectman, designated to the superintendent who was in charge where those poles should be reset; that they told the superintendent he must move them; they were in the way; that at one time there was a large number of poles moved in the street, but it was not done by their orders; that the few poles above mentioned were all the poles ordered by them to be moved; that the 40 or 50 poles moved by McCaffrey were not moved at that time; that he once asked the Company to move the poles in front of the Town Hall, but they refused to do it; said they could not; that the selectmen in 1895 when requesting the Company to move the poles out of the way of the electric railroad never consented in any way to a resetting of the poles in the street and never designated where the poles should be set; that he had heard Daniel W. Bartlett, former Chairman of the Selectmen, both inside and outside town meetings state that the Cable Company had no permit whatever to locate their poles in this town, by which he meant this line we are now considering—the Company with the tall poles.

On cross-examination he testified that he did not know whether Mr. Kimball pointed out to McCaffrey where he might put his poles; that he, the witness, had been over the line part ways
65 with McCaffrey; that Mr. Kimball went along too; that the purpose of going over the line was to point out to McCaffrey what poles were either in the track or too near the track, and so had got to be removed; that he was not prepared to deny that Mr. McCaffrey moved certain poles; that they knew nothing about it; that all he was prepared to say was that he did not order McCaffrey to remove any poles other than those few he had mentioned.

JOHN B. BARTLETT testified that he was a son of Daniel W. Bartlett who was for a good many years Chairman of the Selectmen of the Town of Essex; that he always told the witness that the Company had no permit and no location and the reason that led up to this was the crookedness; that he used to go riding with his brother through the town; that the poles were set slantways, crisscross, and looked like a drunken man about all the way through Essex. Mr. Bartlett also testified as follows: "And I asked the reason why they should be so and he said they had no location. I says: 'Why did they come through Essex?' He says 'They wanted to go through Manchester but there were so many rich people there that would

fight it that they dumped it on to us'." The witness further testified that there is no mail carried over this road.

On cross examination he testified in regard to the condition of the line that "it was set—first you can stop at, we will say, a mile and a half between the line and the Hamilton line, and they were set like this (indicating); it was laughable." That the line was in a shocking condition; that when it was first put up it was the same; no worse; that he would not say the poles slanted 45 degrees, but the top was out certainly three feet from the bottom; that one setting one way and one another, it would set farther; that every inch you get out of the perpendicular decreases the stability of a pole to a certain extent; that the line was never properly set.

66 There was scarcely 100 feet that was in line ever.

BENJAMIN F. RAYMOND testified that he was Treasurer of the Town of Essex; that the mail was not carried over the roads occupied by the telegraph line from Boston, but came by railroad and was brought up from the depot; that in being brought from the depot it was carried 100 or 200 feet on Main Street on which the telegraph line was located; that it was his impression that at the meeting of June 30, 1905, Mr. Ryan wanted to get permission to repair the poles; that they had no right, no location there and this petition was to get the right for the Company that was then there.

GARDNER BURNHAM testified that he had lived in the Town of Essex all his life; that he remembered Mr. Ryan speaking at the meeting of June 30, 1905; that he remembered of the question being raised about the name of the Company; that he could not recall the conversation, but as he remembered it these different names under which they had corresponded with the town at different times meant the same Company, that is, meant the one with the tall poles.

67 ENOCH B. KIMBALL, testified that he was a selectman of the Town of Essex nine years from 1887; that then there was a break and he was elected to the board again in March, 1902; that he was a selectman in 1895; that when the electric road went through the town it was found in some places that the telegraph company's poles would obstruct the running of the cars because some few of them were in the track and some of them very close to the track; that he told Mr. McCaffrey to put these poles sideways; that both applications of the telegraph company for a location, to wit, the one of February, 1902 (Claimant's Exhibit 3), and the one of June, 1905 (Exhibit I), were brought into the office through Mr. MacKenzie, who was a selectman down to within a year; that there was no action taken on the petition of February, 1902; that on the petition of June, 1905, a hearing was held on June 30th at 8 P. M.; that after the hearing the board voted not to grant the location which was asked for; that the petition which they then acted upon was the petition of June 1, 1905, which was introduced as defendant's Exhibit I, a copy of which is hereto attached; that the record book of the meetings of

the selectmen was in court. The witness thereupon read the record of action on the petition of June, 1905, as follows:

"June 21st called a hearing for the location of poles to New England Telegraph Company, to be held June 30th at eight o'clock P. M.

June 30, 1905, hearing for location of poles and wires to New England Telegraph Company of New York. Full board present.

July 10, 1905, full board present. Voted not to grant a
68 location for poles and wires to New England Telegraph Company of New York."

That he had looked over this book and found on leaves torn out or any mutilation of the record in any way; that this inspection of the record embraced a period from 1861 to the present time; that he did not find any permit for a location of poles in the streets to the New England Telegraph Company of Massachusetts, or the Postal Telegraph Company of the United States of America, or the Bennett & Mackay Cable Company of parts unknown; that the selectmen voted not to grant this petition; that he had never been presented with a petition for a location by the New England Telegraph Company of Massachusetts; that there was an older book than the one produced in court which he had examined thoroughly and found no petition there for a permit by any of the companies that had been named and no leaf torn out; that this was the record of weekly doings previous to his being in office and the other book of weekly doings after he left.

On cross examination he testified that at the meeting of June 30, 1905, Mr. Cogswell explained who the people were and what they wanted; that he referred to them as the Cable Company as going through the Town; in other words, the Company that owned the line that was then there; that he said they wanted a location for poles and wires and license to run it; that he did not understand that they wanted two lines there instead of one; that from what Mr. Cogswell said it was plain that it was the same company that owned the line then there and they wanted a location for that same line;

that he had looked carefully through the records of the select-
69 men's meetings to find out whether there was any grant of a right of way or location to a telegraph company and did not see any to any telegraph company at all except the telephone company; that if the application had been in the name of the New England Telegraph Company of Massachusetts, he did not think the selectmen would have granted it; that he supposed that the same company made the application which was already there. Asked whether he remembered Mr. Wardner's asking the selectmen at the conference at Mr. Pillsbury's office whether it made any difference that the petition used that name, and asked for a location, and asked whether he remembered the reply being made that it did not make any difference, that the object of the town was to discover the right which any telegraph company had to use its streets and if it had a right well and good, and if it did not have a right the town was not going to have any telegraph company there, the witness replied that something like that was said. Asked whether he did not meet Mr.

Ryan shortly after the meeting of June 30, 1905, and whether he did not say to Mr. Ryan that the form of the petition made no difference; that the fact that they asked for a location and the fact that they applied in the name of the Telegraph Company of New York was not of importance, but that the idea was to dispute the right of the telegraph company to be there and that was why they refused the petition, he replied he did not remember of saying it made no difference; he may have said he wanted to raise the question on the right of the company to be there, whatever company it might be that owned those poles and wires.

70 AARON COGSWELL testified that he was chairman of the Board of Selectmen; that he had been a selectman for six years; that he was present when both of the petitions referred to were put in; that in regard to the petition of February 3, 1902, (Complainant's Exhibit 3) that was put in by Mr. Hebb; that there was not any formal meeting or hearing held on this petition, simply an informal talk in the office; that the selectmen rode over the line with Mr. Hebb and wanted them to act on this petition; that the selectmen told him that if they did act on it, he would hear from them; that they never did act on it, nothing formal, just talked it over informally; that in regard to the petition of June 1st, his attention was called to the fact that the Company was digging holes and setting poles down by Charles Foster's at the Falls; that this was before the petition of June 1, 1905, was put in; that he took a team and rode up there and took Mr. Foster with him; that he asked the Company's foreman, Mr. Gould, by what authority he was acting and that Mr. Gould replied that he did not know that he had any right; that he told Mr. Gould to stop right where he was until he got a right and came away and left him; that thereafter the witness received the petition of the New England Telegraph Company of New York, June 1, 1905 (Exhibit I), seeking a location in the Town, and the Selectmen determined to call a hearing for June 30, 1905; that a hearing was called all the abutters having been notified; that at the meeting he first read the petition and after the petition was read somebody asked what company this was; that he read
71 the name of the Company on the petition and said that it was the Company that had the large poles in the town; that after the meeting the selectmen went to their office and voted not to grant the petition, which vote was recorded in the books of the selectmen; that he had examined the records in the selectmen's book thoroughly; that the book was present; that he found no evidence of mutilation or any page or pages missing; that Mr. Ryan, foreman of the Company, came to the selectmen's office one evening and witness asked him "What is the contention of your Company?" and he said "That the records have been mutilated:" that the witness asked him what year it was and he said 1884; that the witness then got the selectmen's book and Mr. Ryan examined it with him and was forced to admit that there was nothing that looked like mutilation; that Defendant's Exhibit I of which Complainant's Exhibit 4 was a copy, was the petition on which the selectmen acted and refused;

that he notified the New England Telegraph Company of New York that their petition of June 1, 1905, had been refused; asked to explain how it happened that his memorandum of action on the petition dated June 1, 1905, was on the petition dated February, 1902, he replied "When I wrote that that evening, being in a little hurry, I did not notice which one I wrote it on. Had both papers there. I wrote it on that one instead of erasing it afterwards out on that one the same evening;" that Daniel W. Bartlett, former selectman, told the witness in the selectman's office one day that the New England Telegraph Company of New York never had a location in the town; that witness asked him if he understood what Company he meant, namely, the Company then in the town, and Bartlett replied "Yes," he knew what was meant.

72 On cross examination the witness testified that he considered the failure to act on the petition of February, 1902, equivalent to a refusal; that he supposed the company that wanted a location was the company already there; that he had every reason to suppose it was the line then in the town; that he inferred from what Mr. Bartlett, the former selectman said, that what he meant to say was that they had definitely acted on a request and had refused it.

On re-direct examination he testified that the selectmen had refused the company which was then in Essex any location.

It is agreed that the New England Telegraph Company of Massachusetts was duly incorporated under the laws of Massachusetts April 7, 1884, with a capital of $30,000, for the purpose of constructing lines of aerial or underground telegraph both within and without the limits of said Commonwealth and the owning of interests in such lines, with the powers, rights and privileges and subject to the limitations, duties and restrictions which by law appertain thereto.

The following Exhibits are to be printed as a part of the record:

Complainant's Exhibits 3, 5, and 6.

Defendant's Exhibits A, C, D, E, F, G, H, I and J.

WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON,
Attorneys for the Defendant.

Agreed to:

G. PHILIP WARDNER,
Attorney for the Plaintiff.

73 COMPLAINANT'S EXHIBIT 3.

The New England Telegraph Company, of New York, respectfully petitions the Honorable Board of Selectmen, of the Town of Essex, Mass., for a location for its poles and wires, and license to maintain the same, in following-named streets and highways of said town, viz:—

From the town line of Hamilton, through Western Avenue, Main Street, and Eastern Avenue to the Gloucester line, the new poles to

occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Board.

The Telegraph Company agrees to reserve space for one arm at the top of such of its poles as may be designated by your Honorable Board, for telephone or signal wires owned by the town, and used for municipal purposes only. It is understood that such wires shall be strung and maintained upon the poles by the town, at its own cost, and in such manner as not to interfere with the operation of the wires of the Telegraph Company.

NEW ENGLAND TELEGRAPH COMPANY
OF NEW YORK,
By E. B. PILLSBURY, *Superintendent.*

Dated, Essex, Mass., Feb. 3, 1902.

The above petition is granted.

—— ——,
—— ——,
—— ——,
Selectmen of Essex, Mass.

Dated, Essex, Mass., Feb. —, 1902.

[Endorsed in lead pencil:] Hearing June 30th 1905 at 8 P. M. *1905.* July 10th 1905. Voted not to grant a loeation for poles and wires to the New England Tel. Co.

74 COMPLAINANT'S EXHIBIT 5.

[Town of Essex Seal.]

OFFICE OF TOWN CLERK,
ESSEX, MASS., June 22, 1905.

The New England Telegraph Company of New York, E. B. Pillsbury, Superintendent:

The Selectment of Essex have set the date for a hearing on your petition of June 1st, 1905, for June 30th, 1905, (Friday) at 8 o'clock in the evening.

Please inform me if you receive this notice
And oblige

EPES SARGENT,
Town Clerk, Essex, Mass.

COMPLAINANT'S EXHIBIT 6.

[Town of Essex Seal.]

OFFICE OF SELECTMEN,
ESSEX, MASS., Jul- 11, 1905.

New England Telegraph Co., #84 State St., Boston, Mass.:

At a meeting of the board of Selectment of Essex, held July 10th, 1905, it was voted not to grant the New England Telegraph Co. a location for its poles and wires in this town.

AARON COGSWELL, *Chairman.*

75 DEFENDANT'S EXHIBIT A.

Notice.

To ——:

You are hereby notified that a public hearing will be held at the Town Hall at 8 o'clock P. M., on the 30th day of June. 1905 upon the petition dated June 1, 1905 of The New England Telegraph Company of New York to the municipal officers of the town of Essex for permission to locate and erect a line of poles in the ways or parts of ways designated in said petition, along which designated route of line you are an owner of real estate, as determined by the last preceding assessment for taxation.

EPES SARGENT,
Town Clerk.

Dated June 26, 1905.

(Endorsement:) 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

76 DEFENDANT'S EXHIBIT C.

Postal Telegraph-Cable Company.

Office of the Superintendent, First District, Eastern Division, India Building, 84 State Street.

E. B. Pillsbury, Superintendent.

BOSTON, MASS., June 23, 1905.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

DEAR SIR: On behalf of the New England Telegraph Company of New York, I acknowledge receipt of your letter of the 22d inst., giving notice of hearing on petition of that company for relocation of its poles through your town.

Yours truly,

E. B. PILLSBURY,
Superintendent.

[Endorsed:] 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

Superintendent's Office,
84 State Street,
Boston.

Mr. Epes Sargent,
Town Clerk.
Essex, Mass.

Cancelled
2¢ Stamp.

[Post-Office Cancellation Stamp:] Boston Mass. Jun- 23 8—P. M. 1905.

77 DEFENDANT'S EXHIBIT D.

[Town of Essex Seal.]

Office of the Town Clerk.

ESSEX, MASS., June 22, 1905.

The New England Telegraph Company of New York:

The Selectmen of Essex, Mass., have granted a hearing on the petition of yours (dated June 1, 1905) at the town hall Essex Friday evening June 30 1905 at 8 o'clock.

Please notify me if you receive this notice.

And oblige

EPES SARGENT,
Essex, Mass., Town Clerk.

[Endorsed on Envelope:] 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

Return in five days to
Town Clerk, Essex, Mass.

Cancelled
2¢ Stamp.

The New England Telegraph Company of New York,
New York City.

[Post-Office Cancellation Stamp:] Essex, June 23, 7 A. M., 1905, Mass.

[Stamped on face of envelope:] Returned to sender cannot be found by N. Y. P. O. Jun- 30 1905. Do not post again in this envelope or wrapper. Not in directory No. 4. 1 D.—N. Y. P. O.

[Reverse side of Envelope:]

[Post-Office Cancellation Stamp:] New York, N. Y., Jun- 25, 1 P. M., 1905.

Essex, Mass., Jul- 1, 9 A. M., 1905. Rec'd New York, N. Y., Jun- 23, 5 P. M., 1905.

[Stamped on reverse side of envelope:] Rec'd Gen. Del. N. Y. P. O. Jun- 25, 6 P. M.

78 DEFENDANT'S EXHIBIT E.

GLOUCESTER, April 12, 1905.

To Essex Town Clerk & all whom it may concern:

I have received notice from Essex Town Clerk of a hearing on the erection of Telephone and Telegraph Poles, near my new property there. I cannot be present at the hearing, but wish you to say, I

shall object to any Poles near the house, or on my land in any case. I wish you to take due notice.

CHARLES E. PARKHURST.

My name on your Tax list should be

CHARLES E. PARKHURST.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

After 5 days, return to
C. Parkhurst & Son,
Gloucester, Mass.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

[Post-Office Cancellation Stamp:] Gloucester, Mass., Apr. 12, 6 P. M., 1905.

79 DEFENDANT'S EXHIBIT F.

Boston & Maine Railroad,
Eastern Division, Superintendent's Office.

Winslow T. Perkins, Superintendent.

L. BOSTON, June 26th, 1905.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

DEAR SIR: Your notice of June 26th, of a hearing at the town hall, 8.00 o'clock June 30th, in regard to the N. E. T. Co. of New York desiring to erect poles, etc., please advise if this is to be on our right of way and if so can you kindly send me a little sketch of the same?

Yours truly,

W. T. PERKINS,
Superintendent.

Boston & Maine Railroad,
Eastern Division, Superintendent's Office.

Winslow T. Perkins, Superintendent.

L. BOSTON, June 29th, 1905.

Mr. Epes Sargent, Town Clerk, Essex.

DEAR SIR: Your favor of the 28th inst. is at hand. As I understand it these poles are not located on the Boston & Maine Railroad right of way anywheres. Am I correct?

Yours truly,

W. T. PERKINS,
Superintendent.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Town Clerk, Essex, Mass.

(Ans. June 28, 1905. Copy inclosed.)

[Post-Office Cancellation Stamp:] Boston Jun- 26, 4.30 P. —, 1905, Mass.

80 DEFENDANT'S EXHIBIT G.

F. C. Norton,
Choice Family Groceries,
Agent for the Celebrated Bath Creamery and "White Sponge" Flour.

HAMILTON, MASS., June 28, 1905.

Hon. Board of Selectmen.

GENTLEMEN: I received your notice in regard to erecting poles for the New England Tel. Co. I should feel very bad to have any more poles put up. I should think you would try & make them go on the track same as they do here. If I could come to your meeting I should surely vote against it. I hope the people of your town will do the same.

Yours respectfully,

F. C. NORTON.

(Endorsement on Envelope:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

If not called for in five days return to
F. C. Norton, Hamilton, Mass.

Cancelled
2¢ Stamp.

Mr. Epes Sargent, Essex, Mass.

"Town Clerk."

[Post-Office Cancellation Stamp:] Hamilton, Jun- 28, 6 P. M., 1905, Mass.

81 DEFENDANT'S EXHIBIT H.

BOSTON, May 16, 1906.

I, Epes Sargent, Town Clerk of Essex, County of Essex, and Commonwealth of Massachusetts, do hereby certify, that I have the Records of the town of Essex, in my keeping, and find no leaf or leaves

torn out, no erasures made, and no records of any transactions with the New England Telegraph Company, of Massachusetts.

I have produced for examination the records covering the period of years from 1861 to 1892 for use at a hearing to take testimony in the case of the New England Telegraph Company of Mass. against the town of Essex held May 1906 (beginning on the 10th) in the Federal Building, Boston, Mass.

This does not include records kept by the Selectmen of the town of Essex.

EPES SARGENT,
Town Clerk of Essex.

May 16, 1906.

ESSEX, *ss:*

Then personally appeared the above named Epes Sargent and made oath that the statement subscribed by him is true.

Before me,

FRANK C. RICHARDSON,
Justice of the Peace.

(Endorsement:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11 1913. Filed in Clerk's Office.

82 DEFENDANT'S EXHIBIT I.

The New England Telegraph Company, of New York, respectfully petition- the Honorable Board of Selectmen, of the Town of Essex, Mass., for a location for its poles and wires, and license to maintain the same in the following-named streets and highways of said town, viz:—

From the town line of Hamilton, through Western Avenue, Main Street, and Eastern Avenue to the Gloucester line; the new poles to occupy practically the positions now occupied by the old poles, and any changes in the present locations to be made under the direction of your Honorable Baord.

NEW ENGLAND TELEGRAPH COMPANY
OF NEW YORK,
By E. B. PILLSBURY, *Superintendent.*

Dated, Essex, Mass., June 1, 1905.

The above petition is granted.

——— ———,
——— ———,
——— ———,
Selectmen of Essex, Mass.

Dated, Essex, Mass., June, 1905.

[Endorsed in lead pencil:] Hearing June 30th, 1905. Voted not to grant the above petition July 10th, 1905.

(Endorsement:) 32 Eq. (C. C. 198). N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913. Filed in Clerk's Office.

83 DEFENDANT'S EXHIBIT J.

BOSTON, MASS, May 11, 1906.

We, the undersigned, Selectmen of the town of Essex, duly and legally elected and qualified at the Annual Meeting, held March 5th, 1906, do hereby certify that we are custodians of the two books of records submitted for examination at a hearing held at the Federal Building, Boston, on May 11, 1906. That we have examined them and find no leaf or leaves torn or in any way mutilated in the books; that we find no records in the year 1884 or in the year 1902 relating to any petition of the New England Telegraph Company, or any Telegraph Company except the following records on the following dates:

June 21st, 1905.

Special Meeting.
Full board present.
Called a hearing for location of poles to the New England Telegraph Co. to be held June 30th at 8 o'clock P. M.

June 30th, 1905.

Hearing for a location of poles and wires to the New England Telegraph Co. of N. Y.

July 10th, 1905.

Full board present.
Voted not to grant a location for poles and wires to the New England Telegraph Co. of N. Y.

These two books are all the books of record in the Office of the Town of Essex kept by the Selectmen since 1861.

The Town Clerk in another affidavit has covered the record book of the town kept by himself and produced said book for examination at this hearing, viz: in case of New England Telegraph Company of Mass. vs. Town of Essex held to take testimony in said case May 11, 1906.

AARON COGSWELL,
ENOCH B. KIMBALL,
DAVID E. MEARS,
Selectmen of Essex.

ESSEX, *ss:*

May 16, 1906.

Then personally appeared the above named Aaron Cogswell, Enoch B. Kimball, and David E. Mears, and made oath that this statement subscribed by them is true.

FRANK C. RICHARDSON,
Justice of the Peace.

84 (Endorsement:) 32 Eq. (C. C. 198.) N. E. Tel. Co. v. Town of Essex. U. S. District Court, Mass. Dist. Jan. 11, 1913 Filed in Clerk's Office.

85 *Præcipe.*

(Filed January 14, 1914.)

The following are the portions of the record that the Town of Essex suggests be incorporated into the Transcript on Appeal to the United States Supreme Court:

Bill of Complaint;
Recital of Motion for Preliminary Injunction;
Motion to Amend Bill of Complaint;
Order on Motion for Temporary Injunction;
Answer of Defendant;
Cross-Bill of Defendant, Town of Essex;
Recital of Filing of Replications;
Answer to Cross-Bill;
Agreement as to Facts;
Statement of Testimony in Condensed Form with Exhibits Attached, as filed and agreed to December 22, 1913;
Final Decree;
Opinion of the Court, August 14, 1913;
Petition for Appeal;
Assignment of Errors;
Waiver of Appeal Bonds;
Order Allowing Appeal;
Citation;
Præcipe.

TOWN OF ESSEX,
By WILLIAM B. SULLIVAN,
FRANK C. RICHARDSON, *Its Attorneys.*
NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS,
By G. PHILIP WARDNER, *Its Attorney.*

86 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the New England Telegraph Company of Massachusetts, a citizen of the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* twenty sixth day of November next, pursuant to an Appeal duly obtained from a decree of the† District Court of the United States for the District of Massachusetts wherein the Town of Essex, a citizen of the Commonwealth of Massachusetts and a resi-

dent therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Circuit Judge duly assigned to hold said *the* District Court of the United States for the District of Massachusetts this twenty seventh day of October, in the year of our Lord one thousand nine hundred and thirteen.

FREDERIC DODGE,
U. S. District Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

87 *Acknowledgment of Service on Citation on Appeal.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

November 4, 1913.

I acknowledge service of the within citation.

G. PHILIP WARDNER,
Attorney for New England Telegraph Co.

88 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in said District Court, in the case in equity entitled, No. 32, (No. 198, C. C.) the New England Telegraph Company of Massachusetts, Complainant, v. Town of Essex, Defendant, in said District Court determined, the Opinion of the Court of August 14, 1913, the Petition for Appeal and Supersedeas, the Assignment of Errors, the Waiver of Appeal Bonds, the Order Allowing Appeal, the Condensed Statement of Evidence with Exhibits Attached, Præcipe, and also the original Citation, issued upon the appeal of the defendant in said case, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this fourteenth day of January, A. D. 1914.

[Seal of the District Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 24,021. Massachusetts D. C. U. S. Term No. 340. Town of Essex, appellant, vs. New England Telegraph Company of Massachusetts. Filed January 16th, 1914. File No. 24,021.

[redacted]

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF FOR THE TOWN OF ESSEX.

WILLIAM G. THOMPSON,
GEORGE E. MEARS,
Counsel for the Town of Essex.

BOSTON
PRESS OF GEO. H. ELLIS CO.
1915

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE TOWN OF ESSEX.

STATEMENT OF THE CASE.

This case comes before the Court upon an appeal taken October 27, 1913, by the Town of Essex from a final decree of Judge Dodge entered on that date (p. 18) dismissing with costs a cross bill brought by the Town against the Telegraph Company, and, on the Telegraph Company's original bill, perpetually enjoining the Town,

> "its officers, agents and employees, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or re-location by the complainant on the roads and highways now occupied by its said line of

> telegraph in said defendant town, or with the re-setting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant";

and allowing costs to the Telegraph Company on the original bill.

This decree is expressed to have been made upon the pleadings and the evidence "as filed and presented to the Court," and to be "in accordance with the opinion . . . heretofore rendered."

The original bill (pp. 1–5) was filed on July 31, 1905. On August 3, 1905, by consent, the prayer for relief was amended (p. 6) by making two insertions (p. 5, 17th line), so that it now corresponds, except in one immaterial particular, with the final decree.

On September 5, 1905, Judge Lowell issued a temporary injunction (p. 7), of which the material part corresponds exactly with the final decree.

The only ground of federal jurisdiction alleged in the bill is (p. 2) that the case "arises under the Constitution and laws of the United States," to wit, the Act of Congress "approved July 24, 1866," and "the Act of Congress of March 1st, 1884."

The gist of the case stated in the original bill is that the plaintiff, a Massachusetts corporation engaged in the business of interstate and international telegraphy, including the transmission of messages to and from the Government of the United States, having filed its written acceptance of the restrictions and obligations of the Act of Congress of July 24, 1866 (14 Stat. 221), in the year 1884, with the consent of the Selectmen of the town of Essex, an incorporated town of Massachusetts, erected and

has since maintained certain telegraph poles and wires on three streets in said town, which are post roads within the meaning of the Act of Congress of March 1, 1884 (23 Stat. 3), and are a necessary part of the company's interstate route to Rockport, Mass., where its line connects with an international cable; that by lapse of time certain of the poles have become "old and rotten, and certain of the wires inoperative," so that the line is unsafe, inefficient, and dangerous to the public, and "needs relocating on said highways" (p. 3), with new poles substantially in the positions of the old poles; that on June 1, 1905, the plaintiff "for the purpose of relocating its line," filed a written petition with the Selectmen of Essex, of which a copy is annexed to the bill and marked "A" (pp. 5–6), praying for a location for its poles and wires in said streets, but that the Selectmen by letter, of which a copy is annexed to the bill and marked "B" (p. 6), notified the plaintiff that they would not grant it "any locations for its poles and wires in the town" (p. 4), and at the same time the Selectmen orally declared to the plaintiff that they intended to prevent the plaintiff from maintaining any line of telegraph within the town, and to prevent the plaintiff, by force if necessary, from relocating any of its poles or repairing its lines; so that the plaintiff has been unable to re-set its poles or repair its line in Essex. The bill further alleges (Paragraph VI., pp. 4–5), that the statutes of Massachusetts do not permit a town to refuse to allow a telegraph company to make changes and repairs in its line necessary for efficiency and safety, "nor to refuse absolutely to allow a telegraph company to relocate its line, or to refuse such company any location whatsoever."

It is to be observed that the petition to the Selectmen, Exhibit A, which the bill alleges was the plaintiff's petition, was actually signed by a different company, namely, the New England Telegraph Company of New York. It is to be further observed that the notice from the Selectmen

referred to in the bill as Exhibit B, although signed by Aaron Cogswell, chairman of the Board, does not correctly state the actual vote passed by the Selectmen. The vote as extended and recorded in the official records of the Selectmen was introduced as defendant's Exhibit J (p. 52), and reads as follows:

> "July 10, 1905.
> Full Board present.
> Voted not to grant a location for poles and wires to the New England Telegraph Co. of N. Y."

The defendant's answer (pp. 7–11) put in issue most of the material allegations of fact of the bill, including the allegation that the plaintiff's original construction of its line in 1884 was with the permission of the Selectmen of that time, the allegation that any force was threatened against the plaintiff, and the allegation that the petition of June 1, 1905, was the petition of the plaintiff, averring, on the contrary, that it was the petition of a different company, viz., the New England Telegraph Company of New York (p. 11). But the answer admitted that

> "the town through its Selectmen have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town";

and that the Selectmen

> "forbade the plaintiff from re-setting its poles, from changing the location of its poles, from re-stringing its wires, or from doing business of any sort in said town on the highways of said town, until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts."

The defendant's cross bill (pp. 12–14) prayed that the company might be ordered to remove its poles from the streets, and be restrained from using its poles and wires

"until it shall have first obtained a franchise from the Board of Selectmen"; alleging as a basis for this relief substantially the same matter contained in the town's answer to the original bill.

The company's answer to the cross bill (pp. 15–17) sets up some of the material allegations of fact contained in the original bill, makes certain admissions which will be referred to more particularly in the argument, and contains the following statement, which presents one of the fundamental issues in the case, namely:

> "The complainant denies that before a company organized for the purposes for which the complainant company was organized obtains any rights in the streets of any of the municipalities of Massachusetts, it was obligatory upon the complainants to obtain the consent of the Selectmen of the town of Essex, in accordance with the Statutes of the Commonwealth."

Replications were filled by both parties (p. 17). On April 17, 1912, an agreement (p. 17) as to some of the facts was filed, namely, that it was the plaintiff company that had erected and maintained on said three streets the telegraph line four miles long, consisting of 186 poles and six or seven wires; and that the "United States Government never contributed any sum toward the construction or care of" said streets. This agreement was later supplemented by another agreement (p. 39) that both the plaintiff and the New England Telegraph Company of New York had accepted the restrictions and obligations imposed by federal laws; and later by another agreement (p. 45) that the plaintiff was incorporated under the laws of Massachusetts April 7, 1884,

> "for the purpose of constructing lines of aerial or underground telegraph both within and without the limits of said Commonwealth, and the owning of interests in such lines, with the powers, rights, and

privileges, and subject to the limitations, duties, and restrictions which by law appertain thereto."

It was admitted that the Farmers Loan & Trust Company of New York owns the plaintiff's entire capital stock (p. 34).

The case was heard by Judge Dodge on June 23, 1913, on the pleadings and evidence (p. 18). On December 22, 1913, there was filed a condensed statement of the evidence (pp. 28–52) which may be taken to be equivalent to the evidence presented to Judge Dodge and mentioned in the decree. Such portions of this evidence as are material will be referred to in the argument and need not be summarized here. There is nothing in the evidence from which it can be inferred that the town did or did not own the fee in said streets. But Judge Dodge says (p. 23), "Ownership of the soil of these post roads is not claimed by the defendant town"; and the Town's cross bill, which is sworn to, contains the allegation that the fee of the highways is in the abutters, "subject to the right of the public to pass and repass thereon" (p. 13).

The gist of Judge Dodge's opinion is as follows: The complainant is a telegraph company within the meaning of Rev. Stats., Secs. 5263–5269, and accepted those provisions of law before it constructed its said line in the year 1884. Said streets are post roads within the meaning of Section 5263, and of the Act of March 1, 1884 (23 Stats. 3). The poles and wires are part of an interstate and international system. They do not as a matter of fact interfere with ordinary travel on the streets. On June 1, 1905, when the application of that date (Exhibit A, pp. 5–6) was filed with the Selectmen, repairs and a relocation of the defendant's line on the streets had become necessary. The Selectmen's refusal to grant the application was not on the ground that it was applied for in the name of the New York company with which the plaintiff is affiliated, but was a refusal to grant the plaintiff any location within the

town. The Selectmen desired to raise the question of the company's right to be in the town, and were prepared to resist construction or repair work by force. After the temporary injunction granted on the company's bill the changes made by the company "were only such as were necessary to keep the line in a reasonably safe condition," and "there have been no changes amounting to a change of the location occupied in 1884 and since." The company has not shown that it ever obtained any original location or legal right under the laws of Massachusetts to set its poles in the streets; but that fact does not justify the Selectmen in absolutely excluding the company from the said streets, still less in declining to grant a location or license on any terms whatever under the application of June 1, 1905. Since that is the interpretation which must be put upon the acts of the Selectmen, the conclusion is that the company was lawfully operating its line within the town.

The Town does not suggest that if the company's bill is dismissed, the cross bill can be retained. The Town's general position is that the decree should be reversed and the original bill dismissed with costs.

The assignment of errors filed October 27, 1913 (pp. 24–27), specifies eleven errors, all of which except the second will be relied upon in this brief. They are all involved in one or another of the following propositions, upon which the Town relies in support of its contention that the bill should be dismissed:

I. On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States. (Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 9, 10, 11.)

II. The Selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the Act of Congress of July 24, 1866. (Assignments of Error, Nos. 1, 4, 5, 9, 10, 11.)

III. The threats of the Selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the Town, or against the Selectmen themselves. (Assignments of Error, Nos. 1, 11.)

IV. Even if the preceding three main propositions were all unsound, the final decree should nevertheless be modified by inserting after the word "complainant" in the nineteenth line from the beginning, the words:

> "provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the Board of Selectmen of the Town of Essex of the regulative powers concerning telegraph lines conferred upon said Selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the Town, its officers, agents, and employees, authorized or required by said laws." (Assignments of Error, Nos. 1, 4, 5, 8, 11.)

ARGUMENT.

I.

On the date of the filing of the petition of June 1, 1905, this plaintiff was occupying the streets of the Town of Essex without any right whatever, either under the laws of the Commonwealth or of the United States. (Assignments of Error, Nos. 1, 3, 4, 5, 6, 7, 9, 10, 11.)

A. The plaintiff had acquired no right to occupy the streets by complying with the statutes of the Commonwealth of Massachusetts in force from 1884, when the occupation began, to June 1, 1905.

(*a*) Under each of the three Massachusetts statutes in force from 1882 to 1905, defining the terms upon which any "company incorporated for the transmission of intelligence by electricity" might "construct lines of electric telegraph upon and along the highways and public roads" of the Commonwealth, it was necessary for this plaintiff in order to obtain the right to occupy any of the streets of the Town of Essex with its poles and wires to obtain from the Selectmen "a writing specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run."

(1) This requirement is found in Pub. Stats., Chap. 109, Sec. 3 (printed in full in the Record, p. 25), in force from 1882 to 1902; in Revised Laws, Chap. 122, Sec. 2 (printed in full in the Record, p. 26), in force from 1902 to 1903; and in Stat. 1903, Chap. 237 (printed in full in the Record, p. 26), in

force from 1903 until June 1, 1905, and thereafter; the only difference in the phraseology being the substitution in the two later statutes of the word "poles" for the word "posts."

(2) It has been decided by the Supreme Court of Massachusetts that "the general subject of the construction of lines for the transmission of intelligence on highways is regulated by" these statutes, and that they have always been "intended to govern and be a code for the whole subject." Per Rugg, C. J., in *Metropolitan Home Tel. Co.* v. *Emerson*, 202 Mass. 402, 406–407.

(3) The plaintiff in its original bill, and in its answer to the cross bill, expressly admits that Stat. 1903, Chap. 237, and its two progenitors, are the statutes by which the Commonwealth of Massachusetts has undertaken to define the right of telegraph companies to occupy its highways in so far as the Commonwealth has control over that subject. In its answer (p. 16) to the cross bill the plaintiff says,

> "The complainant says that the provisions of the statutes of the Commonwealth of Massachusetts in respect to the matters in question are contained in Chapter 237 of the Acts of the year 1903, and the complainant prays leave to refer to said act for such provisions."

See also the unmistakable references to the same statute in the original bill (pp. 3, 5).

(4) The provisions of Pub. Stats., Chap. 27, Sec. 49, and Rev. Laws, Chap. 25, Sec. 56 (both printed in full in the Record, pp. 25, 26), and of Rev. Laws, Chap. 25, Sec. 54, on the same subject (not printed in the Record), have been held by the Supreme Court of Massachusetts to be subordinate to the statutes above referred to, and not to define the method by which an original right to occupy the

streets of the Commonwealth, or to relocate poles, may be obtained.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402, 406–407.

Section 54 enables Selectmen

> "to establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph or telephone . . . by every person having authority to place poles, wires, structures, and other appliances for any purpose in or under public ways or places,"

the "authority" referred to being the authority conferred by Rev. Laws, Chap. 122, Sec. 2.

Section 56 contains the same limitation, and also the further limitation of applying only to private citizens as distinguished from corporations.

(*b*) The plaintiff never obtained or made any effort to obtain the written specification referred to in these statutes.

(1) Judge Dodge finds that the evidence is not

> "sufficient to prove that such a specification was ever given the plaintiff by the Selectmen. None is produced by the plaintiff, nor is any record of one found in the town records" (p. 23).

(2) And the evidence, though somewhat conflicting, clearly warrants the conclusion that the reason why no location and specifications were ever granted to this plaintiff was that it never applied for any.

Bartlett, son of the Chairman of the Board of Selectmen of the year 1884, testified that his father (who had died before the beginning of this suit) had always told him that the company had no permit and no location in Essex; that "the reason that led up to this was the crookedness"; and that the

reason why the company came through Essex without a location was that they preferred to do so rather than fight the "rich people" of the adjoining town, Manchester (pp. 41–42).

Raymond, the town treasurer, testified that the company had no location (p. 42).

Sargent, the town clerk, testified that he had carefully examined the records from 1861 to 1902, and found no record of any location granted to the company, and no sign of mutilation of the records (p. 39).

Kimball, a selectman, confirmed the testimony of Sargent on this point (p. 43).

Cogswell, another selectman, added that he had forced the company's foreman to admit that there was no record of any permit in 1884, and no mutilation of the records (p. 44).

There is no hint or suggestion that the company in 1884 or thereafter ever sought to compel the Selectmen by mandamus or otherwise to perform the duty apparently imposed upon them by these statutes to grant a location on some terms, if application were made. If application had really been made and refused, it seems incredible that the plaintiff would not have asserted its rights under these provisions.

To explain the absence of a legal "location" the company produced the testimony of some of its officers and employees, some of which corroborates the Town's evidence, and none of which confutes it.

Bruch, the company's treasurer, testified that the company's minute book contained no record of a location in 1884 (p. 29).

Pillsbury, the company's superintendent, testified that there was no record of any such permit in the company's books in Boston or New York, where such records are usually kept, if they exist (p. 31).

Hebb, a foreman, testified that the Selectmen of 1902 "claimed that the company did not have any permit or franchise through there" (p. 35).

Bartlett, an employee of the company in 1884, testified that he drafted a written application to the town for a "right of way" in 1884 and handed it to the Chairman of the Selectmen (also named Bartlett) at the latter's house (p. 33); but that he did not know whether a "permit" was ever granted on it (p. 33).

And Atchison, one of the company's inspectors, testified that in 1891 or 1892 hearing the company's right to be in the three streets questioned, he sent one Fisher, now dead, to examine the town records, and Fisher reported that the records had been mutilated or destroyed. But on cross-examination he added that Fisher "was merely under the supposition that the permit was on a leaf that was missing in one of the record books" (pp. 33–34).

The so-called petition of 1902 (complainant's Exhibit 3, pp. 45–46) was, according to the testimony, filed with the Selectmen, but never pressed and never acted on (Kimball, p. 42; Cogswell, p. 44). The petition of June 1, 1905, was a copy of the first part of the petition of 1902 (Pillsbury, pp. 30, 31–32; Hebb, pp. 35, 36).

(3) It is to be observed that both the petitions of 1902 and 1905 (Exhibit 3, pp. 45–46; Exhibit I, p. 51) were in the name not of the plaintiff, but of another existing company, the New England Telegraph Company of New York. There was an agreement concerning the latter company (p. 39), which shows that it was an existing and separate corporation; and although the company's treasurer, Bruch, testified that this was a "slip of the pen" (p. 29), and the company's superintendent, Pillsbury, testi-

fied that it was an "error" (p. 32), it was never corrected, and Pillsbury himself admits that no written application for a specification was ever made by the plaintiff, and no written refusal of such a petition was ever made by the Selectmen (p. 32). Moreover, the vote of the Selectmen as actually entered in their records (Exhibit J, pp. 52, 43) was "not to grant a location for poles and wires to the New England Telegraph Company of N. Y."; and notice of this vote was sent to that company at New York City (Exhibit 5, p. 46; Exhibit D, p. 48), and was acknowledged by Mr. Pillsbury himself "on behalf of the New England Telegraph Company of New York" (Exhibit C, p. 47). It therefore clearly appears affirmatively that the only petitions ever received by the Selectmen were not from the plaintiff, but from a different company; and, negatively, that the plaintiff company, which it is agreed was the owner of the lines (p. 17), never made any application for the writing referred to in the statute, and was never refused such a writing.

(4) The express statement of Judge Dodge at the end of his opinion, and the intimation conveyed thereby, that "the plaintiff has been at least since 1905 constantly in the attitude of requesting the town to give the specification," and the preceding sentence that,

> "no failure on the plaintiff's part to do anything which the Town has a right to require under the statutes, state or federal, or can otherwise reasonably require as a condition of giving the specification appears,"

are both incorrect and misleading. *For it does not seem to have been called to the attention of Judge Dodge that under the decisions of the Supreme Court of Massachusetts, the selectmen of a town in granting*

a writing under Stat. 1903, Chap. 237, or its progenitors, Rev. Laws, Chap. 122, Sec. 2, and Pub. Stats., Chap. 109, Sec. 3, and the original statute of 1849, Chap. 93, Sec. 2, act not for the town, or as officers or agents of the town, but as an independent public board representing the Commonwealth directly, and exercising a quasi-judicial authority.

Young v. *Yarmouth*, 9 Gray, 386, 389.
Commonwealth v. *Boston*, 97 Mass. 555, 557.
Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402, 404–405.

Under these decisions an application to the selectmen is not an application to the town, and it is not correct to speak of the town as having a "right to require" anything under these statutes, or of a company as "requesting" the town to give the specification. This misconception of the relation of the selectmen to the Commonwealth and to the town vitiates, as will later appear, the entire reasoning of the learned judge.

(*c*) If it be urged that these statutes do not require that the obtaining of the "writing" shall precede the physical occupation of the streets, the answer is that that is precisely what they do require.

The Commonwealth of Massachusetts has undertaken to exercise its regulative powers over telegraph companies by two sets of statutes, the first set being the statutes with which we have just been dealing, defining the terms upon which a company may obtain from the selectmen as the representatives not of the town, but of the state, an original location, *i.e.*, an original right to enter the town at all; and the second set, being Pub. Stats., Chap. 27, Sec. 49, and Rev. Laws, Chap. 25, Sec. 54, conferring upon the Select-

men power *after* locations (or relocations) have been obtained to "establish reasonable regulations for the erection and maintenance" of the lines.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.

The fact that the last part of Stat. 1903, Chap. 237, overlaps to a certain extent these subordinate statutes, does not affect the general relation of the two sets of statutes.

It may well be the case that companies that have complied with the former statutes regulating the obtaining of locations or relocations, may properly wait for the selectmen to take action in reference to subsequent regulations, and need not themselves take the initiative in applying for such regulations. But the reverse is the case in the matter of the original occupation of any defined portion of a Massachusetts highway, or of any subsequent change in such occupation either from one part of the same street to another part, or to a different street. The word "location" in the statutes of Massachusetts means primarily not physical situation or occupation but the *legal right* of a company physically to occupy a certain part of the highway.

Foster v. *Park Commissioners*, 133 Mass. 321, 332.
Abbott v. *N. Y. & N. E. R.R.*, 145 Mass. 450.
Cambridge v. *Railroad Commissioners*, 153 Mass. 161, 167.
Watertown v. *County Commissioners*, 176 Mass. 22.
Hewitt v. *Canton*, 182 Mass. 220.
Flood v. *Leahy*, 183 Mass. 232.
Worcester v. *Worcester St. Ry.*, 192 Mass. 106.
Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Postal Telegraph Cable Co. v. *Chicopee*, 207 Mass. 341, 345.

In *Abbott* v. *New York and New England R.R.*, supra, Mr. Justice Holmes, speaking for the Court, and construing an act of the legislature giving the railroad three years in which to locate and construct its line, said, page 456:

> "The word 'locate' is a term of art, in using which the legislature can have had but one meaning."

In *Worcester* v. *Worcester St. Ry. Co.*, supra, Mr. Justice Braley, speaking for the Court, said, page 113:

> "Under the provisions of Section 7 (Pub. Stats., Chap. 113, relating to street railways) the board of aldermen and selectmen of towns were authorized to grant original locations to street railway companies, subject to such 'restrictions' as they deemed the public interest required. This word is used in connection with a grant of an interest in real property in a sense analogous to 'conditions,' and either term may denote a limitation upon the full and unqualified enjoyment of the right or estate granted."

In *Foster* v. *Park Commissioners*, supra, Mr. Justice Field, speaking for the Court, said, page 332:

> "The ordinary meaning of the words 'to locate' is 'to ascertain and determine the place of,' and in this sense they might well be used in connection with the technical words 'to lay out.'"

In *Cambridge* v. *Railroad Commissioners*, supra, Mr. Justice Morton, speaking for the Court, said, page 167:

> "The word 'locate' seems to have been used in numerous instances as equivalent to 'lay out,' and to include, like that, the power to fix grades; and we think this is a reasonable construction."

In *Watertown* v. *County Commissioners*, supra, Mr. Justice Barker, speaking for the Court, said, page 29:

> "The main purpose of locating anew is to establish the boundary lines of a road which are in doubt or dispute."

In *Hewitt* v. *Canton*, supra, Mr. Justice Lathrop, speaking for the Court, said, page 223:

> "But it is well settled that the selectmen *in granting a location* do not act for the town, but as public officers exercising a quasi judicial authority." (Italics ours.)

In *Flood* v. *Leahy*, supra, Mr. Justice Hammond used (p. 236) almost identical language; and in *Metropolitan Home Tel. Co.* v. *Emerson*, supra, Mr. Justice Rugg, speaking for the Court, said, pages 404–405:

> "A permit or location is different in kind from a franchise, and is inferior and subsidiary to it. . . . A permit, specification, or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions."

In *Postal Telegraph Cable Co.* v. *Chicopee*, supra, Mr. Chief Justice Knowlton, speaking for the Court, said, page 345:

> "This was the first location granted in the city of Chicopee for the erection and maintenance of electric wires."

But in order that these statutes regulating locations and relocations may have any effect at all, they must be construed as requiring the application or petition to be made and the specification to be issued *before* and not after the actual occupation of streets by the com-

pany. Any other construction would give the company the right to determine its own location or relocation, and would leave to the selectmen only the right to ratify or not. That this is not the meaning of the statutes is sufficiently obvious from their language. Stat. 1903, Chap. 237, refers to towns "through which the lines of a company *are to pass*"—not to towns through which they have already passed. The same language is found in Rev. Laws, Chap. 122, Sec. 2, and in Pub. Stats., Chap. 109, Sec. 3. The specification is to state "where the posts [poles] *may be* located" —not whether the place where they *have been* located is proper. And in Stat. 1903, Chap. 237, we find additional evidence of the same purpose in the use of the words, "any company . . . desiring permission to erect poles . . . shall in writing petition," etc.; and "ways upon which it *is proposed to construct said line.*" And in reference to relocations the language of all three statutes even more plainly shows that the direction of the selectmen must precede the change, if it is to be legal. In every decision of the Supreme Court of Massachusetts in which this question has been at all involved, it is assumed as a matter of course that under these statutes neither an original location nor a relocation can be valid unless it is applied for and the specification granted before any actual occupation of the streets.

Hill v. *County Commissioners*, 4 Gray, 414.
Young v. *Yarmouth*, 9 Gray, 386.
Commonwealth v. *Boston*, 97 Mass. 555.
Pierce v. *Drew*, 136 Mass. 75.
Suburban Light & Power Co. v. *Boston*, 153 Mass. 200.
Met. Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Postal Tel. Cable Co. v. *Chicopee*, 207 Mass. 341.

In reference to similar statutes of other states this Court, as well as an inferior federal court, has expressed the same view.

In *New York* v. *Squire*, 145 U. S. 175, Mr. Justice Lamar, speaking for this Court, said, page 190:

> "It would be an anomaly in municipal administration if every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity, or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow from such a system of practice would be of great gravity to the public and would entail endless disputes and bickerings with prior parties having equal rights."

In *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, Mr. Chief Justice Fuller, speaking for this Court, at pages 98–99 uses similar language; and in *City of Toledo* v. *Western Union Telegraph Co.*, 107 Fed. 10 (C. C. A. 6th Cir.), the Court said, page 12:

> "It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets and the use to which its public places are being subjected, for the city to know *before any construction is put in* what is contemplated, and to have the work done under the supervision of its officers, and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city." (Italics ours.)

B. The plaintiff had acquired no right to occupy said streets by lapse of time or by the acquiescence of any officials.

(*a*) Even if the plaintiff had by complying with the law in 1884 acquired an original legal location, no

occupation under that location however long continued or unchallenged could have been a substitute for strict compliance with the original and all subsequently imposed conditions.

(1) Pub. Stats., Chap. 109, Sec. 15 (printed in full in the Record, p. 25), provides that,

> "No enjoyment by a person or corporation for any length of time of the privileges of having or maintaining telegraph posts, wires, or apparatus in, upon, over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easements, or raise any presumption of a grant thereof."

(2) The corresponding provision of the Revised Laws, Chap. 122, Sec. 26 (printed in full in the Record, p. 26), is substantially the same. It is to be noted that in the tenth paragraph of its answer (p. 17) to the Town's cross bill, the plaintiff apparently explicitly admits that this section applies not only to a corporation that has once legally obtained the privilege of maintaining a line in a town, but also to a company that has actually maintained a line without obtaining specifications from the selectmen. If the plaintiff is held to this admission, the remainder of the argument under proposition *B*, *supra*, becomes unnecessary.

(*b*) *A multo fortiori* the company could not acquire any right to occupy the streets either by lapse of time or by the acquiescence of officials when its occupation was, as in this case, a continuing public nuisance.

(1) A permanent occupation of a portion of a public highway, whether by the poles and wires of a telegraph company, or in any other manner, without legislative authority, is at common law and by

the law of Massachusetts a public nuisance punishable by indictment.

Regina v. *United Kingdom Elec. Telegraph Co.*, 9 Cox Crim. Cas. 174.
3 Dillon Municipal Corporations, 5th Ed., Sec. 1220, and cases cited.
Commonwealth v. *King*, 13 Met. 115.
Commonwealth v. *Upton*, 6 Gray, 473.
Young v. *Yarmouth*, 9 Gray, 386.
Morton v. *Moore*, 15 Gray, 573, 576.
Commonwealth v. *Boston*, 97 Mass. 555.
Banks v. *Highland St. Ry.*, 136 Mass. 485.
New Salem v. *Eagle Mill Co.*, 138 Mass. 8.
Hines v. *Brewer*, 194 Mass. 435.

In *Commonwealth* v. *King*, supra, Dewey, J., speaking for the Court, at page 118, said:

"By the location of a public highway, with certain defined exterior limits, the public acquire an easement coextensive with the limits of such highway. Whoever obstructs the full enjoyment of that easement, by making deposits within such limits of the located highway of timber, stones, or other things, to remain there and occupy a portion of such public highway, is guilty of a nuisance at common law."

In *Banks* v. *Highland St. Ry. Co.*, supra, Colburn, J., speaking for the Court, said, page 486:

"As the telegraph company had no such writing, it had no right to run its wires across Columbus Avenue, as the plaintiff was doing, at the time of his injury. The wire, at least while looped across the street, so that it might be hit by passing carriages, was a nuisance, which any person lawfully travelling on the way, and incommoded by it, might remove."

And in that case it was held that the plaintiff, who was injured by the negligence of the defendant, could not recover because at the time he was injured he was engaged in a criminal act. That case involved Gen. Stats., Chap. 64, Sec. 3, an early form of one of the same statutes with which we are dealing.

Commonwealth v. *Boston*, supra, was an indictment against the municipality for permitting one of its streets to be obstructed by telegraph poles. There was a verdict of guilty. The poles were erected by a corporation established by the laws of New York, but acting under a written specification granted by the mayor and aldermen of Boston under Gen. Stats., Chap. 64, Sec. 3, the same statute that was involved in *Banks* v. *Highland St. Ry.*, supra. It was held that while specifications granted in a case of which the mayor and aldermen of a city or selectmen of a town had jurisdiction, were conclusive upon the rightfulness of the erection of poles in public highways, the jurisdiction conferred by the statute must be strictly confined to the cases therein enumerated, and did not extend to a company organized not under the laws of Massachusetts, but under the laws of some foreign state. The conviction was, therefore, affirmed on the ground that the unauthorized erection of poles and wires upon a public highway was a public nuisance.

In explanation of the fact that the city was indicted, it may be mentioned that under the charter of that day (Stat. 1854, Chap. 448, Sec. 41), the board of aldermen were surveyors of highways, and that under the General Laws then in force (Gen. Stats., Chap. 18, Secs. 75 and 76), if a town was sentenced to pay a fine for a public nuisance consisting of a defect in the highway, the town

could recover the amount of the same of the surveyor of highways, provided the defect was due to his neglect; and that the surveyor also was liable to indictment.

(2) And it is equally well settled in Massachusetts that such a nuisance cannot be legalized by mere lapse of time, or other informal action of public officials. Stat. 1903, Chap. 237, expressly provides that "no such order or specification shall be valid without such certificate," meaning the certificate of the town clerk of notice and hearing; and the two prior statutes require the authorization to be in writing, with certain specifications.

Moreover, the wrong is a continuing one, and is rather aggravated than diminished by lapse of time. The omission of grand juries to indict, or of individuals suffering special annoyance to abate it, or of surveyors of highways and road commissioners to abate it under the authority of Pub. Stats., Chap. 52, Sec. 10, and Rev. Laws, Chap. 51, Sec. 10, cannot bar the Commonwealth of its remedy by indictment. The acquiescence of the Selectmen and of the town itself is wholly immaterial, since neither the town nor the Selectmen (either as agents of the town, or as a quasi-judicial board representing the Commonwealth) are given any right under the laws of Massachusetts to abate public nuisances. In any event, the point is settled by authority.

Com. v. *Upton*, 6 Gray, 473.
Morton v. *Moore*, 15 Gray, 573, 576.
New Salem v. *Eagle Mill Co.*, 138 Mass. 8.

In *Morton* v. *Moore*, supra, Merrick, J., speaking for the Court, said, page 576:

> "Such an obstruction, however long it may be continued, is still unlawful; and therefore no

right can be acquired by persisting in the maintenance of it. It may at any time be abated by indictment."

In *New Salem* v. *Eagle Mill Co.*, 138 Mass. 8, Mr. Justice Holmes, speaking for the Court, and referring to the case of *Cutter* v. *Cambridge*, 6 Allen, 20, said, page 9:

"But we do not read that case as intended to overrule the then recent decisions that a public nuisance was not legalized by being maintained for twenty years."

The following ruling of the court below was sustained:

"That no prescriptive right can be maintained to create a public nuisance, or to bar the right of action by the plaintiff town."

C. The plaintiff prior to the filing of the petition of June 1, 1905, had acquired no right under the Act of Congress of July 24, 1866, to occupy said streets.

(*a*) Even if we adopt for purposes of argument (but not otherwise) that one of the two competing views of the scope of the Act of 1866 which regards that act as conferring a positive right upon telegraph companies which have complied with its provisions to occupy the highways of a state, subject only to the reasonable regulative powers of the state, exercised directly or through subordinate tribunals, the plaintiff still remains on June 1, 1905, a trespasser in the highways of the Town of Essex; for—

(1) As has been shown, the only three statutes by which the Commonwealth of Massachusetts in the period from 1884 to June 1, 1905, had undertaken to regulate the original location and construction of telegraph lines on its highways, were Pub. Stats.,

Chap. 109, Sec. 3 (p. 25), Rev. Laws, Chap. 122, Sec. 2 (p. 26), and Stat. 1903, Chap. 237 (p. 26).

(2) These three statutes cannot be regarded as in themselves conferring arbitrary or unreasonable powers upon the Selectmen. For if the Selectmen are given power absolutely to exclude such a company from all the streets in the town—a power which, if granted, seems to apply only to electric light companies and not to telegraph companies (*Suburban Light & Power Co.* v. *Boston*, 153 Mass. 200),—that power can be exercised only where they determine that the use of any street in the town would "incommode the public use of public ways" within the meaning of Rev. Laws, Chap. 122, Sec. 1 (pp. 25–26), which was not repealed by Stat. 1903, Chap. 237 (p. 26), and of Pub. Stats., Chap. 109, Sec. 2 (p. 25).

Pierce v. *Drew*, 136 Mass. 75, 77–78.

But this limitation is recognized by the Act of Congress itself in the words (Rev. Stats., Sec. 5263):

> "But such lines of telegraph shall be so constructed and maintained as not to . . . interfere with the ordinary travel on such military or post roads."

The only other power given to the Selectmen by these statutes with reference to original locations is the power to specify "where the poles may be located, the kind of poles, and the height at which and the places where the wires may run." These powers constitute obviously only a very moderate exercise of the police power of the State in the interest of the public safety, have only an incidental and remote effect upon interstate commerce (*Postal Telegraph Co.* v. *Chicopee*, 207 Mass. 341, 350), and

are far less elaborate and inconvenient than powers granted by the statutes of other States, the constitutionality of which has been upheld by this Court.

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92.

(3) Moreover, there is no ground for the assumption that if the plaintiff had petitioned the Selectmen of 1884 for a location, they would have dealt with such a petition unreasonably or arbitrarily. The record contains not the slightest evidence to warrant the inference that they would have so acted, and of course the presumption is the other way.

Gundling v. *Chicago*, 177 U. S. 183.

In that case Mr. Justice Peckham, speaking for the Court, said, page 186:

> "He made no application for a license, and of course the mayor has not refused it. Non constat that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor, and was not refused a license."

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160.

In that case Mr. Justice Holmes, speaking for the Court, said, page 168:

> "If the committee and officers do their duty there is no room in the questions left to them for arbitrary whim. . . . The objection that other motives may come in is merely that which may be made to all authority, that it may be dis-

honest, an objection that would make government impossible if it prevailed."

(b) *But the Act of Congress of July 24, 1866, confers no positive right upon any telegraph company which has complied with its provisions to occupy public highways in a state without first obtaining the permission of the state as the owner of the soil, or of the public easement therein, whether the consent of the state or of the subordinate tribunal to which the state has delegated its power is unreasonably withheld or not.*

The cases of importance in which this Court has discussed the nature and limitations of the right conferred by the statute upon telegraph companies with reference to the police power of the state either to occupy the highways of a state in the first instance, or to continue to occupy the highways after an original legal occupation, are the following:

Pensacola Tel. Co. v. *Western Union Tel Co.*, 96 U. S. 1.

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, 100–101.

St. Louis v. *Western Union Tel. Co.*, 149 U. S. 465, 471.

Postal Telegraph Co. v. *Baltimore*, 156 U. S. 210.

Western Union Tel. Co. v. *Ann Arbor*, 178 U. S. 239.

Western Union Tel. Co. v. *Penn. R.R. Co.*, 195 U. S. 540.

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160, 167–169.

This aspect of the statute has also been discussed in the following Massachusetts cases:

Banks v. *Highland St. Ry.*, 136 Mass. 485.

Postal Telegraph Co. v. *Chicopee*, 207 Mass. 341, 343.

And in

Postal Telegraph Co. v. *City of Newport*, 25 Ky. L. Rep. 635.

American, etc., Co. v. *Hess*, 125 N. Y. 641.

City of Toledo v. *Western Union Tel. Co.*, 107 Fed. 10, 12–13.

Sunset Tel. & Tel. Co. v. *Pomona*, 164 Fed. 561; affirmed 224 U. S. 330.

The cases in which the effect of this statute or of the interstate commerce clause of the constitution upon the right of the state to impose upon telegraph companies a license fee or tax as a condition of granting to them the privilege of doing business within the state has been considered, are not in point. The case at bar does not involve in any way the question whether a state can require a party, whether a telegraph company or anybody else, to take out a license for the privilege of carrying on interstate commerce, or whether a state can tax the property of a corporation not situated within the state. Cases turning upon this sort of question are:

Western Union Tel. Co. v. *Texas*, 105 U. S. 460.

Western Union Tel. Co. v. *Pendleton*, 122 U. S. 347.

Leloup v. *Mobile*, 127 U. S. 640.

Postal Tel. Co. v. *Adams*, 155 U. S. 688.

Western Union Tel. Co. v. *Taggart*, 163 U. S. 1.

Western Union Tel. Co. v. *New Hope*, 187 U. S. 419.

Atlantic, etc., Telegraph Co. v. *Philadelphia*, 190 U. S. 160.

Western Union Tel. Co. v. *Missouri*, 190 U. S. 412.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.

Williams v. *Talladega*, 226 U. S. 404.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, supra, the Pensacola Company had erected a telegraph line upon the right of way of a certain railroad running from Florida into Alabama, and later obtained an act of the Florida Legislature giving it the exclusive right to maintain a telegraph line on that route. The railroad later granted to the Western Union Telegraph Company the right to erect a telegraph line upon the same right of way, and the case was a bill in equity by the Pensacola Company to enjoin the Western Union Company from constructing that line. There was a final decree for the plaintiff on the ground that the statute of Florida was in conflict with the Act of Congress of July 24, 1866, so far as it undertook to prevent a company which had accepted the Act of 1866 from using a right of way within the State which such company had secured by private arrangement with the owner of the land. The gist of the case is stated in the following language of Mr. Chief Justice Waite, speaking for this Court, page 11:

> "The statute of July 24, 1866, in effect amounts to a prohibition of all state monopolies in this particular. . . . It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

In other words, while the case decides that the state cannot in its political or sovereign capacity favor one telegraph company over another, *it does not decide that the state cannot as a landowner, or the owner of an easement in its own highways, give or withhold its consent to the occupation of its property just as a private owner could do.* This case also, of course, by implica-

tion decides that railroads are "post roads" within the meaning of the statute, and that was the principal ground of the dissent of Mr. Justice Field and Mr. Justice Hunt.

Western Union Telegraph Co. v. *Massachusetts*, supra, though often referred to in this connection, was a taxation case, and decides merely that the Act of 1864 does not exempt telegraph companies from ordinary taxation upon their property owned and used within the state; but does prevent the collection of such taxes by injunction forbidding the further transaction of business within the state until such tax has been paid. The case, though frequently cited in discussions concerning the right of a telegraph company under the Act of 1866 to enter a state, has in reality no bearing upon that question, because no question was raised but that the company was already lawfully in the state. As pointed out by Mr. Justice McKenna in *Western Union Tel. Co.* v. *Penn. R.R. Co.*, supra (at p. 564), in *Western Union Tel. Co.* v. *Massachusetts*,

> "The telegraph company was in occupation of the post roads of the state of Massachusetts, whether railroads or the ordinary highways does not appear. *Its right to be there was not controverted, and how it got there was of no consequence.*" (Italics ours.)

In *St. Louis* v. *Western Union Tel. Co.*, supra, the point decided was that a telegraph company has no right under the Act of 1866 to occupy the public streets of a city without compensation, and that a municipal charge for such use of the streets by the erection of poles, etc., is not a tax on the privilege of conducting interstate commerce within the state. Mr. Justice Brewer, speaking for this Court, said, page 97:

> "Clearly this is no privilege or license tax. . . . It is more in the nature of a charge for the use of

property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship,' (citing state Freight Tax Case, 15 Wall. 232, 278). If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax."

And again, page 99:

"All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. . . . We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto."

And again, page 100:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, *it cannot abridge any property rights of a public character created by the authority of another sovereignty.*" (Italics ours.)

And again, page 101:

> "And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. . . . This rule extends to streets and highways; they are the public property of the State. . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

This decision appears to be conclusive of the proposition that the Act of Congress of 1866 confers upon telegraph companies no positive right whatever against any state regarded in its capacity as the owner either of the soil of its own highways, or of the public easement of travel thereon.

St. Louis v. *Western Union Tel. Co.*, 149 U. S. 465, was a petition for rehearing filed by the Telegraph Co. after the decision reported in 148 U. S. 92, in which this Court said:

> "We do not understand it to be questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets in this respect and represents the public in relation thereto."

Counsel for the petitioner claimed that the Court misunderstood the company's position, and that in

fact the city of St. Louis had no such control. But Mr. Justice Brewer, speaking for this Court, said, page 467:

> "We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best."

In *Western Union Tel. Co.* v. *Ann Arbor R.R. Co.*, supra, the bill was filed by the telegraph company against the railroad company to restrain the latter from interfering with the plaintiff's rights in a certain telegraph line along the defendant's railroad. The suit was brought in the state court, and the defendant attempted to remove it on the ground that it arose under the constitution and laws of the United States. The question at issue was whether the suit did so arise, and it was held that the bill properly construed asserted that the right to maintain the telegraph line along the defendant's railroad was based upon a contract, and not upon the Act of 1866. Mr. Justice Fuller, speaking for the Court, said, page 244:

> "As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

This is merely a re-assertion of the proposition that *the Act of 1866 has nothing whatever to do with the acquisition of property rights, whether of private individuals, or of municipalities, or of a state.*

In *Western Union Tel. Co.* v. *Penn. R.R. Co.*, supra, the bill was to prevent the railroad from removing from its right of way the plaintiff's telegraph lines. It was filed in aid of a petition at law designed to determine the amount of compensation that the telegraph company should pay to the railroad under the Act of July 24, 1866, for the use of the right of way. The decision was that the Act of July 24, 1866, does not confer upon telegraph companies the right to enter upon private property without the consent of the owner, or grant any right of eminent domain, and that the bill should be dismissed. Mr. Justice McKenna, speaking for this Court, reviewed the previous decisions hereinbefore referred to; stated (p. 562) that the fundamental point decided in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* was merely that the statute "*in effect amounts to a prohibition of all state monopolies*"; that in *Western Union Telegraph Co.* v. *Massachusetts* no question was involved of the nature of the telegraph company's right to be in the state at all; that the essential point decided in *St. Louis* v. *Western Union Telegraph Co.* was that the telegraph company could not continue to occupy the streets of St. Louis without paying the rental required by the municipal ordinance, and that "there can be no entry upon property without payment of compensation"; and said, page 567:

> "Certainly, as to private property or rights, the non-consent of the owner is a factor to be dealt with. Non-consent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain."

And again, page 569:

> "But in the act of July, 1866, there is not a word which provides for condemnation or compensation."

In *Western Union Tel. Co.* v. *Richmond*, supra, the bill was to restrain the enforcement of an ordinance of the city of Richmond on the ground that it infringed the telegraph company's rights under the Act of Congress of July 24, 1866, under the commerce clause of the Constitution, and under the Fourteenth Amendment. The ordinance forbade the erection of poles and wires until the city engineer should first have determined the size, quality, and other particulars thereof; gave the Committee on Streets power to require the telegraph company to permit the wires of other companies to be placed upon its poles on reasonable terms; subjected the poles and wires to the inspection of certain officials of the fire department for the determination of the safety of insulations, etc.; provided a fine for each day's failure to obey an order of these officials; and required the removal within a certain time of all overhead wires within a certain territory, and the substitution of conduits under the supervision of a committee as to size, shape, etc. It was held that this ordinance was not in conflict with the Act of July 24, 1866, or with the Constitution. Mr. Justice Holmes, speaking for this Court, said, page 168:

> "The appellant says that it has the right to occupy the streets of Richmond under the act of Congress, and therefore, although subject to reasonable regulation, it cannot be subjected to a discretion guided by no rules. Neither branch of this proposition, as applied to this case, commands our assent. . . . In view of what we have said and the appellant's admission that it is subject to reasonable regulation, it would be unnecessary to consider its rights under the act of Congress but for some further complaint that the appellant's property is taken without due process of law. That complaint opens the question what property the appellant has."

The learned judge then reviews the previous decisions of this Court already referred to, and proceeds, pages 169–170:

> "Any license that the city may have granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the city's title is infringed by the appellant nothing appears to limit the city's right to insist upon it, as fully as a private owner might. Leaving the question of title on one side, except so far as to note that the appellant does not show one, and that the city has power to admit it to the highways, the other regulations complained of do not violate the appellant's constitutional rights. When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie* it must submit to their terms. We assume, as we have said, that the city has some interest in the streets that is affected by the presence or by the establishment of conduits or poles. . . . Even assuming, as seems to be implied by some of the language in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 104, 105; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, that in consequence of the act of Congress, the city is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties."

It is to be observed that the Court does not here decide that the city "is restricted to reasonable demands," and is thus in a worse position than a private owner. It is submitted that the logic of the situation, including the proposition decided in *St. Louis* v. *Western Union Telegraph Co.*, forbids any discrimination between the state as an owner and a private individual as an owner. Some of the illustrations put in the opinion in *St. Louis* v. *Western Union Telegraph Co.* are entirely inconsistent with such a discrimination; for instance,

the suggestion that under a franchise from Congress to construct an interstate railroad, the grantee could not enter upon the state-house grounds of a state and build a depot there without either condemning the land, or coming to terms by private treaty with the state as a landowner. *The time, we submit, has come to decide squarely that so far as the original right to occupy the highways of a state is concerned, the Act of 1866 has no application, and leaves the company no better off than it would be without the statute.* Full effect can be given to the statute without making any discrimination between the state as an owner of its highways, and individuals as owners of their real estate, and any attempt to make such discrimination inevitably involves the taking without compensation of interests recognized as property (and sometimes as very valuable property), of which the ownership, though in a state, is, as against the national government, strictly private ownership.

The Massachusetts, Kentucky, and New York cases, and the decisions of the Circuit Court of the So. Dist. of California and the Circuit Court of Appeals for the Sixth Circuit, above cited, are in accord with this view of the Act of July 24, 1866.

In *Banks* v. *Highland St. Ry. Co.*, 136 Mass. 485, it was decided that the obtaining of the specification under the state statute was a prerequisite to the right to occupy the streets at all, notwithstanding the Act of Congress of July 24, 1866.

In *Postal Telegraph Co.* v. *Chicopee*, 207 Mass. 341, it was decided that a city might burden the location with the obligation of permitting the city, free of charge, to place its fire alarm, telegraph, or other wires upon the company's poles, notwithstanding the Act of Congress.

In *Postal Telegraph Cable Co.* v. *Newport*, 25 Ky. L.

Rep. 635, Mr. Justice Hobson, speaking for the Court, said, page 637:

> "The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress referred to in the answer [the act of July 24, 1866, and the acts amendatory thereof] conferred on the defendant no right to use the streets and alleys of the city of Newport which belonged to the municipality. This was expressly held in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, and *Postal Telegraph Co.* v. *Baltimore*, 156 U. S. 210. The acts of Congress are only permissive so far as the rights of the Federal government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so except under the ordinance."

In *American, etc., Co.* v. *Hess*, 125 N. Y. 641, it was held that the provisions of the United States statutes authorizing the construction and maintenance by telegraph companies of their lines over and along any military or post roads, and making all letter carrier routes in cities post roads (U. S. R. S., Pars. 3964–5263, 5668, Act of March 1, 1884), confer no rights upon such corporations which can operate to divest the state of control over its public highways, or to interfere with their use as such.

In *Sunset Telephone & Telegraph Co.* v. *Pomona*, 164 Fed. 561, the Court in discussing the Act of Congress of July 24, 1866, said, pages 569–570:

> "Said act does not grant to telegraph companies the right to enter upon private property without the consent of the owner, nor the right of eminent domain. . . . Nor does it confer upon them the right to occupy with their poles, wires, and other fixtures the streets of a city without the latter's consent."

In *City of Toledo* v. *Western Union Tel. Co.*, 107 Fed. 10, it was held that a telegraph company had no right under the Act of Congress to string its wires without first obtaining a permit from the municipal authorities stating exactly what was required in accordance with a municipal ordinance.

If it is urged against this construction of the Act of 1866 that the Commonwealth of Massachusetts in the very statutes in question has recognized a greater force in the Act of Congress of July 24, 1866, by making it mandatory upon the Selectmen to grant an original location somewhere in the town, the answer is two-fold: first, that the statute of Massachusetts in this apparently mandatory form was first enacted in 1849 (Stat. 1849, Chap. 93, Sec. 3), long before the Act of Congress was passed; and, second, that there is at least doubt whether the statute of Massachusetts is mandatory.

Pierce v. *Drew*, 136 Mass. 75.
Suburban Light & Power Co. v. *Boston*, 153 Mass. 200.

(*c*) On the undisputed facts in this case, the Commonwealth of Massachusetts was the owner of an easement for public travel in these streets within the meaning of the decisions in *St. Louis* v. *Western Union Tel. Co.*, supra, and *Western Union Tel. Co.* v. *Richmond*, supra; for—

(1) It is an agreed fact that the "United States Government never contributed any sum toward the construction or care of" said streets (p. 17).

(2) In the town's cross bill (sworn to, p. 15) it is alleged (pp. 12–13) that these streets are "public highways," and that the fee in them is owned by the abutters, "subject to the right of the public to pass and repass thereon." This is the ordinary

situation in Massachusetts where the Commonwealth is regarded as the owner of an easement for public travel.

N. E. Tel., etc., Co. v. *Boston Terminal Co.*, 182 Mass. 397.

That was a petition by the telephone company for the assessment of damages under a statute establishing the Boston Terminal Company and authorizing it to build a union passenger station in Boston, with powers of eminent domain, and provisions for the assessment of damages. In certain streets discontinued under this act the plaintiff had installed certain irremovable conduits and wires, for the injury to which it claimed damages under the statute. It was held that no damages could be recovered. Knowlton, C. J., speaking for the Court, said, page 399:

> "In this Commonwealth on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground as well as upon or above it. Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone and electric lighting companies, and for water pipes, gas pipes, sewers and such other similar arrangements for

communication or transportation as further invention may make desirable. . . . The permanent structures above referred to are permitted because they are used by the public or a part of the public, or are held and used in private ownership for the benefit of the public. The rights in the streets which are so exercised or enjoyed are not private rights of property, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street, or whose property is carried through it. These public rights are primarily subject to the regulation and control of the Legislature which represents the public. This regulation and control is usually delegated to the local authorities by general laws, and sometimes by special laws. But the Legislature remains all the time the supreme authority in regard to all public rights and interests. The authority which it delegates, it may at any time resume, and then it may exercise it as it deems best. . . . All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property."

In *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Mass. 566, in which the question was whether the same statute considered in the case next above cited was constitutional because it gave no damages for the conduits, wires, and other personal property of an electric lighting company placed in the street and rendered useless by the discontinuance thereof, Knowlton, C. J., speaking for the Court, and declaring the statute constitutional, said, page 569:

"Under our system of laws, the fee remains in the original owner or his successors in title, and the land may be used by him in any way that is not inconsistent with the rights of the public under the easement acquired by them when the street was laid out. Upon a discontinuance, the easement is terminated and the entire estate reverts to the owner of the fee."

Having stated that companies placing wires, conduits, or similar things in public streets do so under a revocable license, he added, page 570:

"This construction of the statute is in accordance with the general policy of our law in regard to this easement of the public. . . . The contention that the right of revocation reserved by the ordinances and the permit to the city council cannot be exercised by the Legislature is without foundation. The Legislature is the supreme authority in regard to public rights in the streets and highways."

In *Opinion of the Justices*, 208 Mass. 605, in affirming the constitutional power of the Legislature to permit cities or towns to grant revocable permits or licenses to connect by bridge premises on opposite sides of a public highway, and to charge rent therefor, it is said, page 606:

". . . And the Legislature may require the payment of a rent to the city or town for the slight impairment or limitation of the previously existing public rights," citing *Postal Telegraph Cable Co.* v. *Chicopee*, 207 Mass. 341.

In view of these statements it is unnecessary to discuss the technicalities (mostly historical) of the laws of Massachusetts relating to the construction of highways by towns and counties, or to elaborate the distinction between town-ways and county-ways.

Such distinctions are in no wise involved in this case.

(3) Such an interest of the Commonwealth in the streets of the Town of Essex is clearly sufficient to constitute the Commonwealth an owner of property within the decisions in *St. Louis* v. *Western Union Tel. Co.*, supra, and *Western Union Tel. Co.* v. *Richmond*, supra.

II

The Selectmen's denial of the petition of June 1, 1905, did not impair any Federal right of the plaintiff under the Act of Congress of July 24, 1866. (Assignments of Error, Nos. 1, 4, 5, 9, 10, 11.)

A. The only action of the Selectmen in reference to such a petition, that could violate the plaintiff's rights, would be action taken by them not individually, but as a body at an authorized meeting, and evidenced not by contemporaneous declarations or explanations of individual members of the board, but solely by the record required by the statute under which they acted (Stat. 1903, Chap. 237).

(*a*) As has been several times pointed out in this brief, the Selectmen in acting under this statute act not as agents of the town, but as a quasi-judicial body directly representing the Commonwealth. (See pp. 15, 18 *supra*.)

(*b*) "It is a well settled rule that when municipal councils or boards of any kind are called upon to perform legislative acts or acts involving discretion and judgment in administering the public affairs, they can only act at authorized meetings duly held,"—"The council or board must meet and act as a board or counsel," and "The members cannot make a valid

determination binding upon" the Commonwealth "by their assent separately and individually expressed."

2 Dillon Municipal Corporations, 5th Ed., Sec. 501.
Commonwealth v. *Inhabitants of Ipswich*, 2 Pick. 70.
Day v. *Green*, 4 Cush. 433, 438–439.
Ruggles v. *Inhabitants of Nantucket*, 11 Cush. 433, 436.
Shea v. *Milford*, 145 Mass. 528.

(*c*) This principle is specially emphasized in the very statute under consideration (Stat. 1903, Chap. 237), which requires a public hearing, written notice to abutters, and an endorsement by the town clerk "upon the order or specification of locations granted," and provides that "such certificates, specifications, and decisions shall be recorded in the records of the city or town." This implies formal action *strictissimi juris*.

(*d*) The only evidence of the action of such a body is the record required by law. This is plain from the language of the statute itself, especially the concluding sentence already quoted, "such certificates, specifications, and decisions shall be recorded in the records of the city or town." It is also settled by authority.

2 Dillon Mun. Corps., 5th Ed., Sec. 555.
Taylor v. *Henry*, 2 Pick. 397.
Manning v. *Gloucester Fifth Parish*, 6 Pick. 6.
Andrews v. *Boylston*, 110 Mass. 214.
Halleck v. *Boylston*, 117 Mass. 469.

In *Andrews* v. *Boylston*, supra, Mr. Justice Ames, speaking for the Court, said, page 215:

"The record is the appropriate evidence of the doings of the meeting, and it is not open to contra-

diction, enlargement or explanation by parol evidence."

In *Halleck* v. *Boylston*, supra, Mr. Justice Endicott, speaking for the Court, said, page 470:

> "The record of the proceedings of a town meeting is conclusive in relation to all business there transacted, and cannot be varied or controlled, and omissions therein cannot be supplied by parol evidence. This general rule also applies to the records of parishes, school districts, and similar organizations, and the reasons for the rule are fully stated in numerous decisions of this court."

(*c*) It needs scarcely to be argued that any evidence tending to contradict, enlarge, or explain the recorded vote of the Selectmen, Exhibit J (p. 52), even though admitted without objection, is entirely immaterial and has no probative force, a point apparently overlooked by the learned Judge in the court below.

Buttrick Publishing Co. v. *Fisher*, 203 Mass. 122, 133.
Farquhar v. *Farquhar*, 194 Mass. 400, 404.
Mears v. *Smith*, 199 Mass. 319, 322.
Black v. *Bachelder*, 120 Mass. 171.

B. If proposition *A*, *supra*, is sound, then the Selectmen's denial of the petition of June 1, 1905, could not possibly impair any right of the plaintiff; for—

(*a*) The recorded vote was (Exhibit J, p. 52), "Voted not to grant a location for poles and wires to the New England Telegraph Company of N. Y."

(*b*) This vote, however arbitrary and unreasonable, had relation solely to the petition of another company, and not to any petition of the plaintiff.

C. Even if, however, the petition of June 1, 1905, is regarded as the petition of this plaintiff, as Judge Dodge regarded it, then under the statute from which the Selectmen derived their powers to act at all, they had no jurisdiction to grant the petition; for—

(*a*) It has been held that the statute from which the only power of the Selectmen to act in this matter was admittedly derived (Rev. Laws, Chap. 122, Sec. 2, as amended by Stat. 1903, Chap. 237) must be strictly construed, and cannot be extended by implication.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Commonwealth v. *Boston*, 97 Mass. 555.

(*b*) Under this statute, as has been shown (pp. 18–20 *supra*), the jurisdiction of the Selectmen to grant original locations and specifications is strictly conditioned upon application being made by the company before the actual occupation of the streets and construction of the lines.

(*c*) If the petition is construed as a petition for a relocation rather than for an original location, the Selectmen were equally without jurisdiction to grant it. For their power to grant relocations depends wholly upon the prior existence of a legal location. This construction is required by the use of the word "location" itself in the clause of Stat. 1903, Chap. 237, reading: "After the erection of the lines the . . . selectmen may direct any alteration in the location," etc. The word "location," as has been shown, means an original legal right to occupy. The phrase "after the erection of the lines" plainly means after the legal erection of the lines. The "erection" referred to is the same erection that is referred to in the first part

of the statute in the sentence, "Any company . . . desiring permission to erect poles," etc., and is the same erection that is referred to in the subsequent phrase, "*once erected under the provisions of law.*" In other words, the statute was not intended to give to the Selectmen the power to legalize a physical occupation originally illegal; but merely the power to alter a legal location.

(*d*) If it is suggested that although the petition itself uses the word "location" (pp. 5–6; Exhibit I, p. 51), and although the company in the portion of its answer (p. 16) already quoted refers expressly to Stat. 1903, Chap. 237, as the provision of law involved, yet the petition may be treated as filed not under this statute at all, but under Rev. Laws, Chap. 25, Sec. 54, the answer is that, as already pointed out, selectmen have no jurisdiction to act under that statute until the company has complied with the statute governing locations and relocations, namely, Stat. 1903, Chap. 237.

Metropolitan Home Tel. Co. v. *Emerson*, 202 Mass. 402.
Commonwealth v. *Boston*, 97 Mass. 555.

(*e*) If it is urged that the absence of jurisdiction in the Selectmen required technically a dismissal rather than a denial of the petition, the answer is that that is true but immaterial.

D. If the Selectmen's denial of the petition (assumed for purposes of argument to be the petition of the plaintiff) was required by a state statute which was reasonable on any view of the meaning of the Act of Congress of July 24, 1866, then that denial could not possibly impair any right of the plaintiff under the Act of Congress.

(*a*) If the contrary were the case, we should have the singular situation of a local statutory tribunal being compelled to violate the state statute from which it derived all its powers, and to usurp authority not granted to it, in order to prevent a telegraph company from occupying the streets of a town under the Act of Congress without being subject to any regulation at all as to what streets it should occupy, what part of the streets it should occupy, what kind of poles it should use, and what should be the height of its wires. In *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, Mr. Chief Justice Fuller, speaking for the Court in reference to certain statutes of Missouri and ordinances of the city of St. Louis forbidding any company to place wires under ground in any city until it had first obtained the consent of the city through the municipal assembly, and in reference to a company which was endeavoring to obtain a mandamus to compel the street commissioner of St. Louis to issue a permit to open the streets, when the company had not first complied with the statutes, said, page 99:

> "The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform."

(*b*) If the plaintiff's federal right was subject to the reasonable regulative power of the state, the plaintiff obviously could not enlarge its federal right simply by so acting as to prevent the jurisdiction of the appropriate state tribunal from attaching.

It may be urged that what this argument really means is that the plaintiff cannot obtain a legal location in Essex without first removing its lines, or ob-

taining an act of the Massachusetts Legislature validating its long-continued tortious occupation of the public highways in that town; and that this would be great hardship on the plaintiff. The town need not fear this contention; for if the logic of the situation imposes hardship upon the plaintiff, who is to blame for that hardship? Not the town, because at no time during the whole period of the company's occupation had the town as a corporate body any right whatever under the laws of Massachusetts to legalize the nuisance. Not the Selectmen, because under the strict limitations of the statute they also have been powerless to legalize the nuisance. Not the Commonwealth of Massachusetts, because its delay in prosecuting a continuing crime is not equivalent to a pardon. The blame lies wholly upon the company itself as an original and continuing wrong-doer, and the hardship of complying at this late day with the reasonable laws of the Commonwealth can hardly be urged in this tribunal as a reason for setting those laws aside, or enjoining their enforcement.

In *Commonwealth* v. *Boston*, 97 Mass. 555, several times previously cited in this brief, a far greater hardship was imposed upon the telegraph company for a failure to obtain an original legal location than would be imposed in this case.

E. And even if we assume for purposes of argument not only that the petition of June 1, 1905, was the petition of the plaintiff, but also that the action of the Selectmen may be ascertained not merely from their records, but also from the contemporaneous declarations and explanations of individual members of the board, still no impairment of any federal right of the plaintiff under the Act of Congress of July 24, 1866, is shown; for—

(*a*) The fair import of the evidence is not that the Selectmen declared that they would never under any circumstances grant this plaintiff any location in the town, but merely that they would not grant the plaintiff a location so long as its violation of law continued, *i.e.*, until by removing its lines from the town it had put itself in a position to invoke the jurisdiction of the Selectmen.

(1) The evidence concerning the contemporaneous declarations of the Selectmen consists of the letter of July 11, 1905, of their chairman, Aaron Cogswell, to the plaintiff (Exhibit B, p. 6), and his testimony (pp. 44–45); and the testimony of the plaintiff's superintendent, Pillsbury (pp. 30–31), and of the plaintiff's foreman, Ryan (pp. 37–38); of Sargent, the town clerk (p. 40), and of the Selectman Kimball (p. 43).

(2) This is the construction put upon the evidence by Judge Dodge. He says (p. 23) that the town

> "justifies its attempt to exclude the plaintiff, or stop the operation of its line within Essex, only by the claim that the company has never obtained a location for the line from the Town authorities, according to the state statute."

And, page 20:

> "At a subsequent conference between the Selectmen and representatives of the plaintiff, it was stated to the plaintiff, by or on behalf of the Selectmen, that they would not grant a location to any company, in any street of the Town, unless actually forced to give it, and that they desired to raise the question of the company's rights to be in the Town."

And, page 21:

> "The cross bill asks that the plaintiff be ordered to remove its poles, and for an injunction forbidding the plaintiff to use its line within Essex for the purposes of its business until it shall have first obtained a franchise from the Board of Selectmen, as provided by the laws of Massachusetts."

(*b*) But if, as is the case, the statute under which the Selectmen were acting was itself not a violation of the Act of Congress, then declarations by the Selectmen which amounted to no more than this, that they would never act under the statute except upon the conditions prescribed by the statute for conferring jurisdiction upon them, could not relieve the plaintiff from the necessity of putting itself in a position to comply with those conditions.

(*c*) Again, no declarations of the Selectmen, however sweeping or unwarranted, could bind their successors in office, or impair the plaintiff's rights by anticipation.

Littlefield v. *Boston & Albany R.R.*, 146 Mass. 268.

Hewitt v. *Canton*, 182 Mass. 220, 223.

N. Y., N. H. & H. R.R. Co. v. *New Rochelle*, 60 N. Y. Supp. 904.

Non constat that these Selectmen would not have changed their attitude if a petition over which they had jurisdiction had been presented to them.

Gundling v. *Chicago*, 177 U. S. 183.

(*d*) Finally, if the Act of Congress of July 24, 1866, is construed as conferring no positive right upon any telegraph company to occupy public highways in a state without first obtaining the permission of the state as owner of the soil or of the public easement of travel

therein, regardless of whether such consent is reasonably or unreasonably withheld, then it makes no difference how sweeping the declarations of these Selectmen were as to their purposes or intentions, or whether or not they had jurisdiction under the state statute to entertain the petition of June 1, 1905, or whether, having such jurisdiction, they reasonably or unreasonably refused to grant the petition.

For, as has been pointed out in an earlier part of this brief (pp. 28–40 *supra*), if in construing this statute the state as the owner of the easement of public travel is to be put upon an equal footing with a railroad company, or with an individual owner of private property, then the company can no more, under the Act of Congress of July 24, 1866, force the state to part with its property rights because its terms or its refusal to treat happen to be unreasonable, than could a company force a private owner to permit it to put its poles through his front yard because he unreasonably refused to permit such use of his yard on any terms whatsoever. Such, we submit, is the necessary result of the decision of this Court in *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92.

III.

The threats of the Selectmen furnish the company no ground whatever for equitable relief in a Federal court, either against the Town, or against the Selectmen themselves. (Assignments of Error, Nos. 1, 11.)

A. In the first place, whether the Selectmen threatened merely to institute legal proceedings, or to resort to physical force, this plaintiff as an open and persistent violator of the

state laws is not entitled to invoke the assistance of a court of equity at all, especially to enable it to continue such violation.

Cragin v. *Powell*, 128 U. S. 691.
Roberts v. *Northern Pacific R.R.*, 158 U. S. 1, 13.
Atwood v. *Fisk*, 101 Mass. 363.
Lawton v. *Estes*, 167 Mass. 181.
Snow v. *Blount*, 182 Mass. 489.
Downey v. *Gove Co.*, 201 Mass. 251.
Lyons v. *Elston*, 211 Mass. 478.
Sunset Tel. & Tel. Co. v. *Pomona*, 164 Fed. 561, 580; affirmed 224 U. S. 330.

In *Atwood* v. *Fisk*, supra, the similar principle of the Roman law is referred to as expressed in the maxim "Procul, o procul este, profani!"

In *Sunset Tel. & Tel. Co.* v. *City of Pomona*, supra, Wellborn, J., said, page 580:

> "As complainant is unlawfully maintaining its intrastate and local lines in the streets of Pomona without right and against the city's consent, it will not be heard to say that the removal of such unlawful obstructions was or is otherwise informal. A suitor must come into a court of equity with clean hands, and cannot, in such a forum, protect an unlawful occupancy of streets by asserting that such occupancy is being informally or irregularly disturbed."

B. Even if we adopt an interpretation of the language of the Selectmen most favorable to the plaintiff, as does Judge Dodge (p. 20), and treat their threat as a threat to "prevent construction work by force, if necessary," rather than as a threat to prevent it by a resort to legal proceedings, still the District Court had no right to make those threats the ground for an injunction either against the town or against the Selectmen; for—

(*a*) The District Court as a federal court of equity could give relief in this case only for the violation of a federal right. That is the ground and the only ground upon which jurisdiction is claimed in the bill. The averment of the bill is that (p. 2),

> "The matter in dispute in this suit largely exceeds, exclusive of interest and costs, the sum or value of $2000; and that, as hereafter more fully set forth, *it arises under the constitution and laws of the United States*, etc."

No diversity of citizenship exists or is alleged.

(*b*) But although this allegation doubtless gave the District Court jurisdiction to determine whether the federal right existed, and also whether it had been violated, the District Court had no jurisdiction to decree relief to the plaintiff unless and until it appeared that the federal right not only existed, but also had been violated.

The Fair v. *Kohler Die Co.*, 228 U. S. 22.

(*c*) Unless at the time these threats were made the plaintiff had a right to maintain, repair, or reconstruct its lines by virtue of the Act of Congress of July 24, 1866, then no threat of the Selectmen to prevent the doing of any of those things, however violent the threat may have been, could violate the plaintiff's federal rights. It has already been shown that whether we adopt one or the other of the two possible constructions of the Act of Congress of July 24, 1866, the plaintiff at the time the threats were made was not in the exercise of any federal right. It is wholly immaterial whether the Selectmen's threats were declarations of an intention to violate some state law against assault and battery, breach of the peace, rioting, etc., or not.

(*d*) It may be added that the threats of the Selectmen would in no event warrant an injunction against the Town, even in a court of general equity jurisdiction. For if it be conceded that the Selectmen in threatening physical force were acting not in their capacity as public officials of Massachusetts, but in their capacity as agents or officers of the Town, still they acted *ultra vires*. The limits of their authority are stated in the following language in the answer of the town (p. 10):

> "It is admitted that the town, through its Selectmen, have notified the plaintiff that the town intended to prevent the plaintiff from maintaining or operating any line of telegraph whatsoever within the limits of said town. The defendant denies that any threat was made that the plaintiff would be prevented from attempting to relocate any of its poles in said highways, or that any force was used to stop said relocation. It is admitted that the Selectmen of said Town of Essex forbade the plaintiff from resetting its poles, from changing the location of its poles, from restringing its wires, or from doing business of any sort in said town on the highways of said town until first a franchise was obtained therefor in accordance with the laws of the Commonwealth of Massachusetts."

This language shows no authorization by the town to the Selectmen to use physical force. It implies simply a determination to resort to legal proceedings. There is nothing whatever in the record throwing any further light upon the scope of the authority of the Selectmen to act for the town in this matter. It will hardly be contended that *virtuti officii* they had authority from the town to resort to assault and battery. Moreover, it appears plainly enough from the testimony that the Selectmen themselves had in mind simply the institution of legal proceedings, and not physical force. (See the testimony of Ryan, p. 38; Kimball,

p. 38; Cogswell, p. 44.) The only witness who talks about physical force is the company's superintendent, Pillsbury (pp. 30–31).

But if, nevertheless, the inference is drawn that the Selectmen did threaten physical violence, while that might justify a state court in making a decree against them as principals, it would not justify a decree against the town as their principal.

IV.

Even if the preceding three main propositions were all unsound, the final decree should nevertheless be modified by inserting after the word "complainant" in the nineteenth line from the beginning, the words:

> "provided that nothing herein contained shall be construed to prohibit a reasonable exercise by the Board of Selectmen of the town of Essex of the regulative powers concerning telegraph lines conferred upon said Selectmen as a public board by the laws of the Commonwealth of Massachusetts now or hereafter in force, or any action by the defendant, its officers, agents, and employees, authorized or required by said laws." (Assignments of Error, Nos. 1, 4, 5, 8, 11.)

A. The significance for present purposes of the assumption that the three preceding main propositions are unsound is that the Act of Congress of July 24, 1866, conferred upon the plaintiff a positive right to occupy the public highways in the town of Essex, subject only to the reasonable regulative action of the Selectmen as a public board under Stat. 1903, Chap. 237; that the Selectmen under that statute were not ousted of jurisdiction to entertain the petition of June 1, 1905, by the fact that the plaintiff had originally constructed and for a long time main-

tained its telegraph line on said streets without obtaining the "writing" referred to in said statute; that the action of the Selectmen in denying said petition was arbitrary and unreasonable, and constituted a violation of the plaintiff's rights under the Act of Congress, aggravated by the Selectmen's subsequent threats of physical force; and that the town as a corporate body had adopted the act of the Selectmen performed in their capacity as a quasi-judicial public body in denying the petition, as well as their subsequent declarations and threats, in whatever capacity such declarations and threats were made. These are the propositions which the plaintiff must maintain in order to entitle itself to a decree against the town. These are the propositions which the defendant has controverted under the three preceding headings of this brief.

B. The terms of the injunction are plainly open to a construction which would deprive the Commonwealth of Massachusetts of all power in the future to impose any regulations at all upon the lines of this plaintiff within the town of Essex.

(*a*) While it is true that the injunction runs only against "the defendant, its officers, agents, and employees" (p. 18), and that in granting locations and relocations, as well as in establishing regulations concerning the other particulars mentioned in Stat. 1903, Chap. 237, the Board of Selectmen act not as officers, agents, or employees of the town, but as an independent public body directly representing the Commonwealth (*Young* v. *Yarmouth*, 9 Gray, 386, and cases cited p. 15 *supra*); yet the language of the injunction is plainly susceptible of a broader construction which would reach the Selectmen as agents of the Town. For the Selectmen are in a variety of matters officers and agents of the town.

Deane v. *Randolph*, 132 Mass. 475.
Hawkes v. *Charlemont*, 107 Mass. 414.

And if at some future time, acting under the last part of Stat. 1903, Chap. 237, or its present substitute, Stat. 1911, Chap. 509, Sec. 2, the Selectmen should "direct an alteration in the location of the poles, piers . . . or in the height of the wires," or "by order authorize" another company "to attach its wires and fixtures to" the poles of the plaintiff company, or "by order grant to" another company a "joint or identical location for the erection or construction of poles . . . to be owned and used in common by them," they might do so at the peril of an attachment for contempt on the ground that the injunction was aimed at the persons who might from time to time hold the position of Selectmen regardless of the capacity in which they might be acting. And this danger is increased by the sweeping language of the latter part of the injunction, enjoining

> "the defendant, its officers, agents and employees, . . . *from in any manner causing or allowing any other person or corporation to interfere with or stop such location, re-location, re-setting, repairs or changes by the complainant*";

and by the use of the words "location" and "relocation" in the body of the injunction. The use of these words might well be made the basis for the claim that the purpose of the injunction was to restrain such officers and agents of the town as had the right under the state statutes to deal with locations and relocations, whether in so dealing they were acting as agents or officers of the town or not. And the fact that under the state statutes no person acting in the capacity of officer or agent of the town has anything to do with locations or relocations of telegraph lines, would afford strong ground for the contention that the words "officers" and "agents" as used in the injunction were

intended as a designation of persons, and not of any particular capacities.

(*b*) But an injunction against a quasi-judicial body established by the laws of a state, restraining them not from enforcing any particular order which may be deemed in violation of some federal right, but from exercising their functions at all, is an injunction against the state itself.

Cunningham v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446.
Hopkins v. *Clemson College*, 221 U. S. 636, 642.

C. Even if such an injunction were not in violation of the Eleventh Amendment to the Constitution of the United States, so sweeping a prohibition would be far in excess of anything necessary to protect the rights of the plaintiff under the Act of Congress of July 24, 1866, even when construed as the plaintiff contends it should be construed. For we do not understand that the plaintiff contends (and certainly the contention, if made, would not be sustained) that the Act of Congress entirely exempts telegraph companies from all regulation by the states, or by subordinate tribunals of the state.

D. The injunction also plainly and unwarrantably deprives the town of a remedy expressly conferred upon it by the laws of the Commonwealth in case of a violation by any corporation of reasonable regulations made by the Selectmen under Rev. Laws, Chap. 25, Sec. 54.

(*a*) Section 54 has already been several times referred to (pp. 10–11, 14, 48 *supra*). Its material provisions are as follows:

"The selectmen may, within their respective towns . . . establish reasonable regulations for the erection and maintenance of all lines for the trans-

> mission of intelligence by telegraph or telephone, by electricity or otherwise . . . by every person having authority to place poles, wires, structures and other appliances for any purpose in or under public ways or places," etc.

This section, as already pointed out, is subordinate to the provisions of Stat. 1903, Chap. 237, and the "authority" referred to in it means the authority first obtained under that statute.

Met. Home Tel. Co. v. *Emerson*, 202 Mass. 402.

(*b*) Rev. Laws, Chap. 25, Sec. 55, provides a remedy for the violation of Section 54, the material language being:

> "The town shall forthwith in writing give notice in detail to the owner, constructor or person using any line therein which is constructed or maintained in violation of such regulations; and if thereafter such unlawful construction is continued, or if said lines are not within a reasonable time so altered as to conform to said regulations, the supreme judicial court or the superior court shall have jurisdiction in equity to enjoin the further progress of said work, or to order such line to be removed or altered at the expense of the owners, constructors, or persons using the same."

(*c*) But under the terms of this injunction it would plainly be a contempt of court for the town to institute proceedings in the state courts under Section 55, however high-handed or arbitrary the action of the plaintiff might be. On no possible theory of the meaning of the Act of Congress of July 24, 1866, can such an injunction be justified.

E. The decree also unwarrantably abrogates, so far as this particular line is concerned, the provisions of Rev. Laws,

Chap. 122, Secs. 16–23, both inclusive, which contain detailed requirements concerning the strength of wires and supports and the insulation thereof in towns for protection against fire, the marking of wires with the owner's name at different points, and the appointment by the selectmen of an official termed an inspector of wires to enforce these regulations; the conferring of jurisdiction in equity upon the Supreme Judicial Court and the Superior Court at the suit of the town to enforce the orders of the inspector; and similar provisions which it is unnecessary to refer to more in detail. The material portion of Section 18, however, is as follows:

> "A city shall, by ordinance, designate or provide for the appointment of an inspector of wires, and any town may, at an annual town meeting, instruct its selectmen to appoint such an inspector. Such inspector shall supervise every wire over or under streets or buildings in such city or town and every wire within a building which is designed to carry an electric light, heat, or power current, shall notify the person or corporation owning or operating any such wire whenever its attachments, insulation, supports, or appliances are improper or unsafe, or whenever the tags or marks thereof are insufficient or illegible, shall, at the expense of the city or town, remove every wire the use of which has been abandoned and every wire which is not tagged or marked as hereinbefore required, and shall see that all laws and regulations relative to wires are strictly enforced. A city or town may recover in an action of contract of the person or corporation owning any wire so removed the expense which it has incurred for the removal thereof."

Section 19 reads as follows:

> "The supreme judicial court or the superior court shall have jurisdiction in equity upon petition of the officer or inspector designated or appointed as aforesaid, to enforce the provisions of the three preceding sections and to restrain the use or maintenance

or to cause the removal of any wire, pole, or other support which is erected, maintained, or used in violation of the provisions of said sections."

It needs no argument to prove that a decree which renders it a contempt of a federal court for a town or its agent, the inspector, to enforce these two statutes, cannot be justified by the Act of Congress of July 24, 1866, and is a wholly unwarrantable invasion of the rights reserved to the Commonwealth of Massachusetts by the Constitution of the United States. A construction of the Act of Congress which permitted such a result would require a decision that the act itself was void.

F. The decree also unwarrantably hampers the town in protecting itself by ordinary equitable proceedings in the state courts, irrespective of the special statutes mentioned above, from the possibility of liability under Rev. Laws, Chap. 51, Sec. 18, to travellers for a defect in the highway in case this line should by reason of the company's violation of reasonable regulations become a defect.

(*a*) Rev. Laws, Chap. 51, Sec. 18, is as follows:

"If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway or bridge, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town or person by law obliged to repair the same, he may, if such county, city, town, or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city, or town more than one-fifth of one per cent of its state valuation last pre-

ceding the commencement of the action nor more than four thousand dollars, and no action therefor shall be maintained by a person whose carriage and the load thereon exceeds the weight of six tons."

(*b*) The law of the Commonwealth has always been that in the case of obstructions of a highway of such a character that the town may sustain special damage thereby, particularly by being held liable for a defect under the statute above quoted, the town by its selectmen may maintain a bill in equity to abate the nuisance, even though the ownership of the easement of public travel is in the state, and the general remedy for obstructions thereof is by indictment or information by the Attorney General representing the Commonwealth.

Springfield v. *Connecticut River Ry. Co.*, 4 Cush. 63.
Winthrop v. *Farrar*, 11 Allen, 398.
Needham v. *New York & New England R.R.*, 152 Mass. 61.

There are similar decisions in other jurisdictions.

Easton R.R. Co. v. *Greenwich*, 25 N. J. Eq. 565, 567.
Rio Grande R.R. Co. v. *Brownsville*, 45 Tex. 88, 92.
Johnston v. *Providence R.R. Co.*, 10 R. I. 365.
Moundsville v. *Ohio River R.R. Co.*, 37 W. Va. 92, 100.
Detroit, etc., R. Co. v. *Macomb*, 109 Mich. 371.

(*c*) It is plain that the terms of the injunction are so sweeping as to render the institution of such litigation by the town or its agents, the selectmen, a contempt of court, no matter how gross and long continued might be the violation by the plaintiff of reasonable regula-

tions requiring or prohibiting "changes by the complainant."

G. The limitation of the decree by the language suggested in the proposition is the least that is required to render the decree valid on any theory of the scope of the Act of Congress of July 24, 1866. The insertion suggested qualifies the injunction simply by saving the present and future laws of Massachusetts on the subject. None of the present laws of Massachusetts concerning the regulation of telegraph lines have been attacked or can be successfully attacked as in violation of the Act of Congress or of the Constitution of the United States. If the Commonwealth should in the future pass laws invading some federal right, the validity of such laws ought to be tested, not upon an application for contempt in this case, but in independent proceedings. The effect of the insertion is practically to make the injunction applicable only to the employment of physical force, or other physical interference, and that is all that should be enjoined on any arguable theory of the meaning of the Act of Congress.

WILLIAM G. THOMPSON,
GEORGE E. MEARS,
Counsel for the Town of Essex.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 56.

TOWN OF ESSEX, APPELLANT,

v.

NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE TOWN OF ESSEX FILED BY LEAVE OF COURT ON THE QUESTION OF JURISDICTION UNDER SEC. 238 OF THE JUDICIAL CODE.

STATEMENT OF THE QUESTION.

The question has been raised whether there was any right under Sec. 238 of the Judicial Code to take this appeal direct from the District Court to the Supreme Court. That right exists

> "in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction

> alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The only part of Sec. 238 material for present purposes is the following:

> "In any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States . . . is drawn in question; and in any case in which the . . . . law of a state is claimed to be in contravention of the Constitution of the United States."

The original federal jurisdiction of the Circuit Court, from which this case was transferred to the District Court, was based upon the allegation of the bill (Rec. p. 2)

> "that the matter in dispute in this suit largely exceeds, exclusive of interest and costs, the sum or value of $2,000; and that, as hereafter more fully set forth, it arises under the Constitution and laws of the United States."

The bill alleges no claim arising directly under the Constitution of the United States, but does claim rights under two laws of the United States; namely, the Acts of Congress of July 24, 1866, and March 1, 1884, averring that the first law authorized the appellee to occupy with its poles and wires post roads of the United States, and that the second law made three highways in the town of Essex post roads within the meaning of the first law (Rec. p. 2). The bill further alleges (Par. VI, pp. 4–5) that the laws of Massa-

chusetts do not permit a town to do what the bill elsewhere (Par. VI, p. 5) alleges the Selectmen of Essex have done; namely,

> "to refuse to allow a telegraph company to make changes, repairs, and resetting in its line necessary to keep said line in a state of efficiency and safety, nor to refuse absolutely to allow a telegraph company to relocate its line; or to refuse such company any location whatsoever."

In other words, the bill in substance alleges that the town of Essex, through its Selectmen, has attempted to deprive the appellee of rights granted to it by the two Acts of Congress, and that in so doing the town and the Selectmen acted without warrant of any valid state law. The bill treats all the acts of the Selectmen complained of as acts done on behalf of the town, and makes no discrimination between their act in refusing the location or relocation, which, as shown in our original brief, was done by the Selectmen not as agents of the town, but as a branch of the state government, and their threats and other oral declarations, which, whether binding on the town or not, were not acts performed by the Selectmen in their quasi judicial capacity as representatives of the state.

The town's answer in the following language (Par. 3, p. 8) puts directly in issue, (1) the appellee's construction of the two Acts of Congress; (2) the appellee's construction of said Massachusetts statutes; and (3) the validity of the two Acts of Congress under the United States Constitution, if the appellee's construction of them is correct:

> "The defendant denies that the Act of Congress of 1866 authorized the plaintiff to construct, maintain, and operate its line of telegraph over the roads and streets of the defendant without first having obtained a franchise from its board of selectmen in accordance with the statutes of the Commonwealth of Massachusetts; and the defendant further denies that the act of March 1, 1884, made all public roads subject

to the use of the plaintiff for its business purposes without any grant from the legally constituted officers of the defendant or the legislature of the Commonwealth of Massachusetts. The defendant denies that the act of March 1, 1884, gave the plaintiff any rights or privileges. The defendant avers that said act only declared what highways should be used as post routes. *The defendant denies that Congress has the authority under the Constitution of the United States to grant to the plaintiff any rights in the public highways of the defendant.* It further denies the authority of Congress under the Constitution of the United States to grant to the plaintiff any authority to use the public highways of the defendant without first having obtained the permission of the duly authorized officers of the defendant, or the authority to take said streets or such rights in said streets by the right of eminent domain granted by the Massachusetts legislature; that Congress has no right to grant to the plaintiff rights to use its public town or streets without some provision for compensation. . . . This defendant denies that the United States has any interest whatever in these streets or highways. It denies that the United States ever expended any sum of money or performed any services or contributed any valuable thing toward the construction or maintenance of these highways, or that the United States has any control whatever over these highways which will enable Congress to grant to the plaintiff any rights therein to do its private business."

The answer further (Par. 4, p. 10) refers to the statutes of Massachusetts preventing the obtaining of any prescriptive right or easement in public streets by long continued illegal occupation; and concludes (Par. 6, p. 11) with an averment that the appellee

> "never had any rights whatsoever in the highways of the town of Essex, either by grant from Congress, from the General Court of Massachusetts, or from the Selectmen of the town of Essex, or any other legally constituted authority";

but that the appellee originally occupied the highways without obtaining from the Selectmen the written specifications required by Pub. Stats., Chap. 109.

Substantially the same allegations are contained in the town's cross bill (Rec. pp. 12–14). The appellee's answer to the cross bill (Par. 4, p. 15) "denies that the Government of the United States . . . has no interest in the highways," and (Par. 5) no interest in the complainant; and further denies (Par. 7, p. 16) that before it could obtain any rights in the streets "it was obligatory upon the complainant to obtain the consent of the Selectmen of the town of Essex in accordance with the statutes of the Commonwealth," specifying (Par. 10, p. 17) Revised Laws, Chap. 122, Sec. 26, as the applicable state law.

Judge Dodge held with the appellee that, if these streets were post roads, the Act of Congress of July 24, 1866, gave the appellee the absolute right to occupy them in the sense that it could not be excluded by the state laws or action of Selectmen authorized by those laws (Rec. pp. 22-23); also that the Act of Congress of March 1, 1884, making these streets post routes, also made them post roads, and in so operating was "an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads"; declared (p. 22) that

> "The legislation of Congress so far as it has gone is supreme because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service";

and that the appellee "holds its privilege to run its lines through the post roads referred to under the laws of Congress"; does not discuss the construction of the state statutes requiring such companies to obtain a written specification, but by necessary implication declares them inoperative if they permit a refusal of the specification by

the Selectmen (Rec. p. 23, fol. 33); and made a final decree in favor of the plaintiff.

On this state of the record we maintain the following propositions:

I. This is a case in which the constitutionality of two laws of the United States were drawn in question within the meaning of Sec. 238 of the Judicial Code, namely, the Act of July 24, 1866, and the Act of March 1, 1884.

II. This is a case in which both the construction and application of the Constitution of the United States were involved within the meaning of Sec. 238 of the Judicial Code.

III. This is a case in which the law of a state was claimed to be in contravention of the Constitution of the United States within the meaning of Sec. 238 of the Judicial Code.

ARGUMENT.

I.

This is a case in which the constitutionality of two laws of the United States were drawn in question within the meaning of Sec. 238 of the Judicial Code, namely, the Act of July 24, 1866, and the Act of March 1, 1884.

A. All that must appear in order to show that the constitutionality of a law of the United States was "drawn in question" within the meaning of Sec. 238 of the Judicial Code is that at some stage of the trial in the District Court, and by one party or the other, a question of the constitutionality of a law, not previously decided by the Supreme Court, was seriously presented to the District Court.

Loeb v. *Columbia Township Trustees*, 179 U. S. 472.
Arkansas v. *Schlierholz*, 179 U. S. 598, 601.
American Sugar Refining Co. v. *United States*, 211 U. S. 155.
Rakes v. *United States*, 212 U. S. 55, 58.
McFadden v. *United States*, 213 U. S. 288.
Kaufman Co. v. *Smith*, 216 U. S. 610.
City of Memphis v. *Cumberland Co.*, 218 U. S. 624.

In *Loeb* v. *Columbia Township Trustees*, supra, it was held that the opinion of the Court below transmitted with the record might be examined to ascertain whether either party claimed that a state statute was in contravention of the Constitution of the United States. There seems no reason for drawing a distinction between examining the opinion below for the purpose of seeing

whether either party made a certain "claim," and examining it for the purpose of seeing what was "drawn in question" by either party.

In *Memphis* v. *Cumberland Co.*, supra, it is said by Mr. Justice Day, speaking for the Court:

> "Under Section 5 of the Court of Appeals Act the right to come to this court by direct appeal is given in any case in which it is 'claimed' that a constitution or law of a state is in contravention of the Constitution of the United States. It is thus apparent that the claim to give a right of appeal under this section need not necessarily be in the pleading of the party invoking the jurisdiction of the court. It is sufficient if such right is duly claimed in the case. The statute is silent as to how this claim shall be made."

The same rule must apply to the determination of whether the constitutionality of a law of the United States has been "drawn in question."

B. In the case at bar the true test of whether the constitutionality of a law of the United States was "drawn in question" is fully satisfied, *i.e.*, it appears both from the appellant's answer and also from the opinion of Judge Dodge that the question of the constitutionality of the Acts of Congress of July 24, 1866, and of March 1, 1884, was seriously insisted upon by the appellant in the court below. And it is also true that, while the constitutionality of those statutes may have been assumed by this Court, the question has never been directly presented to and decided by this Court.

(*a*) While the town denied the appellee's interpretation of the two laws, the town emphatically insisted, both in its answer and in its cross bill, upon the unconstitutionality of those two laws if they were intended to confer the right claimed by

the appellee, namely, the right regardless of state statutes to occupy in the first instance highways of a state in which the United States had no property interest. See the town's answer (Par. 3, p. 8), cross bill (Pars. 5 and 7, p. 13), referred to and in part quoted in the introduction to this brief. The fact that the construction of the Act of Congress was also drawn in question is immaterial so long as that was not the only question relating to the Act which was drawn in question.

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397.

In that case Mr. Justice Harlan, speaking for the Court, said (p. 407):

> "But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the *construction* of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court."

In *Savage* v. *Jones*, 225 U. S. 501, which was an appeal from the Circuit Court directly to the Supreme Court, the appellant attacked as unconstitutional a state statute, but alleged in the court below that if the statute were properly construed it would not be unconstitutional, averring, however, that the proper state officer had construed it in a manner to make it unconstitutional. Mr. Justice Hughes, speaking for the Court, said (p. 519):

> "A general demurrer for want of equity was

> sustained, and in view of the substantial character of the contention the case must be regarded as one in which the law of a state is claimed to be in contravention of the Constitution of the United States."

In the town's answer in the case at bar the reference to compensation unmistakably identifies Article 5 of the Amendments to the Constitution of the United States as the constitutional provision with which the laws of the United States are in conflict. The references in the answer to the Act of March 1, 1884, also make it clear that the town desired to draw in question the right of Congress to pass such an act under the power granted by Article 1, Section 8, to establish "post offices and post roads," on the ground that, as construed by the appellee, it involved the exercise of a power not delegated to the United States by that provision of the Constitution, and thus in violation of the 10th Amendment.

(*b*) It appears plainly in the opinion of Judge Dodge that he regarded the constitutionality of these two Acts of Congress as having been "drawn in question." He adopted the construction of them upon which the bill was based, and declared that they were (p. 22) "an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads"; and that (p. 22)

> "The legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service."

These expressions refer unmistakably to the issue of constitutionality presented by the portion of the

defendant's answer to which we have referred. But even if Judge Dodge had omitted entirely to discuss the question of the constitutionality of the laws, the question would none the less have been drawn in question by the appellant's answer and would have been none the less essentially involved in the decision of the case.

(*c*) Far from being a frivolous question, or one merely of words, the question of constitutionality thus drawn in question was of the most serious and substantial character. It has never been directly decided by this Court. It is unnecessary merely for the sake of proving a negative to cite again here the decisions of this Court dealing with these two statutes. They are collated and analyzed on pages 28–38 of our original brief. They all deal with the *construction* and not with the constitutionality of these statutes. No case has yet been presented to this Court in which the Act of July 24, 1866, has been held by the court below to apply to a situation like the situation presented in the case at bar, that is to say, to legalize an original physical occupation of the highways of a state made without coming to terms with the state, either directly or through the appropriate administrative or quasi-judicial department, and in defiance of the laws of the state. This is not the first instance, nor will it be the last, of a statute remaining on the statute books for years, and repeatedly construed and applied to situations to which it could constitutionally apply, and assumed to be constitutional because the full scope of its possible operation had never been disclosed in any particular litigated case. So far as this appellant is concerned, and until the final decree is reversed, the Act of July 24, 1866, at the present time means what the District Court has declared it to mean.

If it means that, the appellant claimed below and claims here that it is unconstitutional.

C. The question of the constitutionality of the two laws of the United States thus presented in the court below has been properly reserved for this Court by appropriate assignments of error. We do not understand this proposition to be disputed. The assignments of error are Nos. 6, 7, 10, and 11. The argument that the laws as construed by the District Court are unconstitutional is found on pages 38 and 53 of our original brief. It cannot be fairly suggested that, because we have devoted the larger part of our original brief to advocating a construction of these two laws different from the construction placed upon them by Judge Dodge, and one that would render them constitutional, we have therefore abandoned our claim made in the court below, and repeated in the assignments of error, that, if our construction is not adopted, the laws are unconstitutional.

II.

This is a case in which both the construction and application of the Constitution of the United States were involved within the meaning of Sec. 238 of the Judicial Code.

A. All that it is necessary to show in order to make a case "that involves the construction or application of the Constitution of the United States within the meaning of Sec. 238 of the Judical Code" is that a substantial question concerning the construction or application of the Constitution was presented by either party to the District Court at some stage of the proceedings prior to the decision in that court. This proposition is supported by some if not all of the cases

cited under Proposition I-*A*, *supra*. In addition we refer to *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U. S. 226, 231, and to the language of Mr. Justice White in the dissenting opinion in *Memphis* v. *Cumberland Telephone Co.*, 218 U. S. 624, 638. The decisions of this Court are clearly to the effect that whether a case "involves the construction or application of the Constitution of the United States," in the sense required to give this Court appellate jurisdiction, does not depend, like the question of original federal jurisdiction, upon the point whether the plaintiff's first pleading contains a distinct claim under the Constitution of the United States, but may be answered in the affirmative where it distinctly appears from any part of the record that either party presented for the consideration of the court below a substantial question involving the construction or application of the Constitution of the United States, and logically connected with the issues in the case. In other words, there appears to be little if any distinction between the significance of the three expressions "involves," "drawn in question," and "claimed," as used in Sec. 238.

B. The case at bar meets the test of "involving the construction or application of the Constitution of the United States." The allegations of the appellant's answer already referred to presented as clearly a question involving the construction and application of the Constitution of the United States as of the constitutionality of the two laws of the United States to which they refer. For to determine that a law of Congress is unconstitutional necessarily involves an application of the Constitution, and generally involves a construction of it. The appellee's answer to the cross bill presents with equal clearness questions involving the construction and application of the Constitution of the United States. The answer (Par. 4,

p. 15) "denies that the Government of the United States has no interest in the highways" and no interest in the complainant. But whether the Government of the United States had an interest in the highways depended in the last analysis upon the construction and application of Article 1, Section 8, of the Constitution, giving Congress the power to establish post offices and post roads.

Judge Dodge, in sustaining the constitutionality of the two Acts of Congress in question, says (p. 22):

> "That 'post routes' as there used means anything different from 'post roads,' I am unable to believe, in view of the decisions which have treated this enactment as an exercise of the express power given Congress by the Constitution (Art. 1, Sec. 8) to establish post offices and post roads."

And he adds that

> "There can be no doubt that in the case of a company like the plaintiff, engaged in transmitting interstate, international, and Government messages, the legislation of Congress, so far as it has gone, is supreme; because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service."

He here applies also the interstate commerce clause of the Constitution.

III.

This is a case in which the law of a state was claimed to be in contravention of the Constitution of the United States within the meaning of Sec. 238 of the Judicial Code.

In view of the authorities heretofore cited concerning what must appear in order that the case may be one in

which "the law of a state is claimed to be in contravention of the Constitution of the United States," all we need to show is that one party or the other claimed, either expressly or by necessary implication, that the applicable laws of Massachusetts, interpreted as the other party contended they should be, were in conflict with some provision of the Constitution. All that the appellant can fairly argue under this heading is simply this: that the appellee claimed by necessary implication that, if the state statutes meant what the appellant contended they meant, namely, that the appellee could not legally occupy the highways of Massachusetts without first obtaining a written specification of location from the Selectmen, then those statutes were in direct conflict with the Acts of Congress of July 24, 1866, and of March 1, 1884, and were therefore void. In other words, the appellee's claim was that the state laws were directly in contravention of the federal laws, and thus indirectly in contravention of the Constitution of the United States; and that is the claim that Judge Dodge sustained when he said (Rec. p. 22):

> "No state can exclude a telegraph company which has accepted the terms proposed by the national Government for this national privilege from prosecuting its business within the state."

And (p. 23):

> "The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. A state cannot so exclude or prohibit, either directly or indirectly. . . . And if the state cannot so exclude or prohibit, no town within the state can do so under state authority."

He finds as a fact that the appellee did not obtain before occupying the highways in 1884 "the specification in writing" required by the law of Massachusetts then in force; and concludes that the appellee was nevertheless lawfully

occupying the highways in the town of Essex at the time it made its application of June 1, 1905, for a location or relocation of its lines. We think we have shown conclusively on pages 9–25 of our original brief that the applicable state laws of the year 1884 as construed by the Supreme Court of Massachusetts made the obtaining of the written specification an absolute prerequisite to the appellee's original legal occupation of the highways; and that without that specification the appellee under the laws of Massachusetts was and always thereafter remained a trespasser upon the highways, and in the commission of a continuing criminal nuisance. Those are the laws to which the District Court refused to give effect. Judge Dodge, as shown in our reply brief, does not even find that the appellee before occupying the highways in 1884 even tried to comply with the state laws; but by implication finds the contrary (Reply Brief, pp. 8–9).

As suggested on page 12 of our Reply Brief, the appellee seems to be in the inconsistent position of attacking by necessary implication the validity of the state laws in force in 1884 regulating the original occupation of highways by a telegraph company, and of recognizing, or at least not attacking, the validity of the state laws on the same subject in force at the time of its application of June 1, 1905, although the latter laws were the same in substance as those which were in force in 1884, when the appellee's occupation of the highways began. But it should have been added on page 12 of our Reply Brief that, if this apparent inconsistency is analyzed, it will be found that the final decree in the appellee's favor as clearly involves a setting aside of the state laws in force in 1905 as of the state laws in force in 1884.

CONCLUSION.

We have here a case brought to enforce affirmative rights in the highways of a state alleged to have been conferred upon the plaintiff by two acts of Congress. We find the defendant at the very first opportunity denying in explicit and emphatic terms that Congress had the power under the Constitution of the United States to confer upon the plaintiff the rights claimed by the plaintiff, and by unmistakable reference identifying the particular provisions of the Constitution which forbade the conferring of those rights. There is nothing in the record to show that the defendant did not adhere to this position throughout the trial of the case in the District Court. On the contrary, we find the defendant, when it became an appellant, insisting upon the same position in its assignment of errors. We find the defendant also urging a construction of the two Acts of Congress which would remove at once the constitutional objection to them and the entire basis of the plaintiff's case. We find that construction rejected by the District Court, the plaintiff's construction adopted, and a decree made against the appellant, which necessarily involved a determination against the appellant of the constitutional questions thus presented by it. This the appellant submits is entirely sufficient to make a case for an appeal directly to this Court under Sec. 238 of the Judicial Code.

But if more is required, we find both parties in their pleadings presenting questions involving the construction and application of the Constitution of the United States, and we find those questions discussed by the District Court in its opinion.

And we also find the plaintiff, both in its original bill and in its answer to the town's cross bill, asserting a position with reference to the powers of Congress under the

Constitution of the United States, and with reference to the exercise of those powers by the Acts of July 24, 1866, and March 1, 1884, which if sound renders void certain statutes of the Commonwealth of Massachusetts in force in 1884, when the appellee's occupation of the streets began.

Finally, the constitutional questions thus "involved," "drawn in issue," and "claimed" are not frivolous questions, but, on the contrary, are all substantial and hitherto undecided questions, upon the determination of which the power not merely of the town of Essex, but also of the Commonwealth of Massachusetts itself to regulate the use of the public highways of the Commonwealth, and to be undisturbed in the ownership of the easement of public travel thereon, depend.

If it should be urged in reply to what we have said that the constitutional questions "involved" and "drawn in issue," and the constitutional rights "claimed" in this case, all appertain rather to the Commonwealth of Massachusetts than to the town of Essex, that the Commonwealth is not a party, and that the town cannot avail itself of a violation of the rights of the Commonwealth under the Constitution of the United States, the answer is that, although the property in the easement of public travel in these streets is in the Commonwealth, nevertheless the town is merely a subordinate department of the Commonwealth, and that, as pointed out on pages 60–64 of our original brief, the Commonwealth has delegated to its towns, including the appellant, important police functions, and has imposed upon them onerous liabilities with reference to public highways within their limits, and that this delegation of power and imposition of duties gives the town as a municipal corporation a sufficient interest in the highways to warrant the town in raising the constitutional questions raised in this case. Moreover, the allegation in the third paragraph of the town's cross bill (Rec. pp. 12–13)

that the town originally built and paid for these highways "at its sole expense" is admitted by the appellee in the third paragraph of its answer to the cross bill (Rec. p. 15).

Respectfully submitted,

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